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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA COAST COMPANY, a corporation, *Appellant,* *vs.* ALASKA PACIFIC FISHERIES, a corporation, *Appellee.*	No. 2647.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF APPELLANT

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CARROLL B. GRAVES,
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Proctors for Appellant.

Seattle, Washington.

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STATEMENT OF THE CASE.

This is a suit *in rem,* against the Steamship "Jeanie," to recover for alleged damage to a shipment thereon of 29,657 cases of canned salmon on a voyage from points in Alaska to Seattle in December, 1912, and January, 1913.

The action was commenced by appellee by the filing of a libel on September 29, 1913, and appel-

lant claimed and released the vessel as owner. The pleadings to be considered are the Libel, a First Amended Libel, a Second Amended Libel, and an Amended Answer.

Each of these libels contained many allegations, denied by the amended answer, which appellee offered no evidence to sustain, and which are immaterial on this appeal, except as we shall refer to some of them in our discussion of the errors relied upon, as having a bearing upon the questions there raised. The allegations of the libels which were tried and upon which the court based its decision, were unseaworthiness of the vessel to carry this cargo, because of uncleanliness from coal dust, and insufficient protection of the cargo against the seas encountered. These allegations were denied in the amended answer, as were also the allegations in the libels as to the damages to the cargo claimed by appellee. In its amended answer appellant pleaded, as an affirmative defense, the issuance of bills of lading for the cargo, and failure of appellee to comply with the terms of such bills of lading in making claim for its alleged damage and in bringing suit therefor. By the second amended libel, which contained matter in the nature of a reply, this affirmative defense was denied and an alleged

waiver of the conditions of the bills of lading pleaded.

Evidence was taken before a Commissioner and reported to the court, and two depositions also taken. The court, to which the case was submitted on these pleadings, and the evidence taken, found the vessel was unseaworthy in the two particulars above mentioned, held the vessel liable, and rendered judgment on July 12, 1915, in favor of appellee and against appellant and the surety upon its release bond, for the sum of $12,796.26 damages and interest, and $204.90 costs, from which judgment this appeal is taken.

It will be necessary to refer in detail to much of the testimony, in our argument on the errors relied upon here, so we will not attempt to make a statement of this testimony at this time. However, there is no dispute as to many of the facts in the case.

In the year 1912, appellee owned and operated salmon canneries at Chilkoot, Yes Bay and Cholmley, in Southeastern Alaska, and owned the canned salmon referred to above. Prior to the shipment of this salmon on the "Jeanie," the officers of appellee had left these canneries in the sole charge of a

watchman at each, and it had at each cannery a large amount of canned salmon in cases, which it intended to ship to Seattle.

The "Jeanie" was a wooden, steam vessel of about eight hundred tons burden, about twenty-two years old, the last twelve or fourteen years of which time she had run between Seattle and Alaska ports. On the voyage in question the vessel was under charter to W. T. Swan, acting manager for charterers, for trade between Seattle and Alaska points. The vessel left Seattle in December, 1912, on her northbound voyage, with cargo, including coal in bulk. A portion of this coal was discharged at Juneau, and afterwards about 10,747 cases of this salmon taken aboard at the Chilkoot cannery.

After passing Chilkoot, the vessel attempted to pass to the westward, partly through the open ocean, but met such rough weather she could not make headway and turned back. After some further attempts to go to westward, this part of the voyage was abandoned on account of the bad weather. A portion of the remaining coal cargo was unloaded at Sitka, and the balance at Ketchikan later.

After unloading all of the balance of the coal at Ketchikan, the vessel proceeded to Yes Bay

cannery, where it took aboard about 13,972 cases of canned salmon; it next went to Cholmley cannery, where it loaded the balance of the salmon in question, about 4,737 cases. The vessel then proceeded to Seattle, encountering much severe weather on the way.

On arrival of the vessel at Seattle on January 8, 1913, it was found that some of the salmon cases and the cans therein were damaged by water and coal dust. While the cargo was being unloaded, about 2,000 cases, showing damage, were set aside, and afterwards some of the other cases were found more or less damaged. The entire cargo was overhauled by Mr. Horner. No damage was done to any of the salmon in the cans, but some or all of the cans in 4,088 of the cases, out of the entire shipment of 29,657 cases, were reconditioned, some being merely wiped off and relacquered, and some cleaned, relacquered and relabeled. Many new cases or parts of cases were furnished, and the whole cargo, so far as was necessary, was put in first-class, marketable condition, as good, or better, than when it was shipped. This work was not completed until March 19, 1913.

This suit was brought to recover the sum of $4,283.06, which amount appellee alleged it was com-

pelled to pay Mr. Horner for this work upon the cargo; also to recover certain other items of alleged damage, which appellee claimed it sustained on account of the damaged condition of the cargo. In the first and second amended libels some of these other items of damage were either changed or abandoned, and new items included, particular reference to which will be made in our argument.

The trial court allowed as damages, the sum of $4,283.06 as the cost of overhauling and reconditioning the cargo, and $7,935.00 as the depreciation in the market price of the salmon during the reconditioning period. Judgment for these amounts, with interest also allowed by the court, and costs, was entered against appellant and its surety.

The questions involved in this statement of the case, and presented here by the assignment of errors, together with the manner in which those questions are raised upon the record, are as follows:

I.

Appellant will claim that there is not sufficient evidence in the case to sustain a finding that the "Jeanie" was unseaworthy upon this voyage, either as to cleanliness or otherwise; but that the evidence shows that everything required by law and good

seamanship, as well as due and proper regard for the transportation of this cargo of salmon, was done to clean the vessel of coal dust and protect the cargo therefrom. It will also claim that the evidence shows that the vessel was seaworthy, in the matter of protection of the cargo from the weather which might reasonably have been expected upon this voyage, and in all other respects; and that all water damage to the cargo was caused by a peril of the sea, for which the vessel was not liable.

Appellant's Assignment of Errors Nos. I, V, VI, X and XI will be discussed under this heading.

II.

Appellant will claim that bills of lading were issued and accepted for the transportation of the salmon in question, which bills of lading became binding contracts of both the appellee and the vessel, for the carriage of this cargo. That appellee failed to comply with the terms of such bills of lading relative to filing claim for their alleged damage, and bringing suit therefor, and therefore this suit was barred.

Appellant's Assignment of Errors Nos. II, III, IV, V, VI, X and XI will be discussed under this heading.

III.

Appellant will claim that, even if the vessel be found unseaworthy, the evidence wholly fails to show that appellee was damaged in any sum whatever on account of depreciation in market price of this salmon during the period of reconditioning; but that, on the contrary, the only evidence in the case on this question shows beyond controversy that appellee suffered no loss whatever on this account; and that under the evidence and the law applicable thereto, appellee is not entitled to recover the sum of $7,935.00, or any sum whatever for damages on account of depreciation in market price.

Appellant's Assignment of Errors Nos. VIII and IX will be discussed under this heading.

IV.

Appellant will claim that even if the vessel be found unseaworthy, the uncontradicted testimony of appellee's witnesses shows that the sum of $4,283.06, allowed as damages for the cost of reconditioning the cargo, is largely in excess of the actual amount paid or incurred by appellee for such reconditioning, due to damage received on the vessel; and that in any event this item of damages must be greatly reduced.

Appellant's Assignment of Errors No. VII will be discussed under this heading.

V.

If the vessel should be held liable for any damage in this case, but the award made by the trial court be reduced in any particular, any allowance of interest in the judgment upon the amount of such reduction would also be disallowed.

SPECIFICATION OF ERRORS RELIED UPON.

I.

The said court erred in holding, finding and decreeing that the said steamship "Jeanie" was unseaworthy upon the voyage in question in said cause.

II.

The said court erred in holding, finding and decreeing that there was an oral understanding or agreement for the transportation of the cargo involved in said cause upon the said steamship upon the said voyage.

III.

The said court erred in holding, finding and decreeing that no bills of lading for the transportation of said cargo upon said vessel on the said voy-

age were delivered to any officer or authorized agent of said libelant; and that the watchman to whom such bills of lading were delivered were utter strangers to any responsible or authoritative head of said libelant company.

IV.

The said court erred in holding, finding and decreeing that the bills of lading, issued and delivered for the transportation of said cargo upon said vessel on said voyage, were not binding upon the parties hereto, but were inoperative, and that said vessel and claimant herein were not released from liability for all or any part of the damage to said cargo upon said vessel on said voyage by reason of the failure of said libelant to comply with the terms and conditions of said bills of lading relative to filing claim and commencing suit for such damage.

V.

The said court erred in holding, finding and decreeing that said vessel, and claimant herein, were not exempt from liability for all or any part of the damage to said cargo upon said vessel on said voyage, under the terms of the Act of Congress commonly known as the Harter Act.

VI.

The said court erred in holding, finding and decreeing that the said vessel, and claimant herein, are liable to libelant for all or any part of the damage to said cargo upon said vessel on said voyage.

VII.

The said court erred in awarding and decreeing to libelant herein as and for its damage, on account of injury or damage to said cargo upon said vessel on said voyage, the sum of four thousand two hundred eighty-three and 6/100 dollars ($4,283.06), or any part thereof, as the cost of reconditioning said cargo, in that said award was not warranted by the evidence herein and was and is excessive and erroneous.

VIII.

The said court erred in awarding and decreeing to libelant herein, as and for its damage on account of injury or damage to said cargo upon said vessel on said voyage, the sum of seven thousand nine hundred thirty-five dollars ($7,935), or any part thereof, as the amount of depreciation of the market price of said cargo during the period of reconditioning such cargo, in that said award

was not warranted by the evidence herein, and the law applicable thereto.

IX.

The said court erred in holding, finding and decreeing that libelant herein is entitled to recover any amount whatever herein against said vessel, or claimant or its stipulator herein, on account of depreciation in market price of said cargo; and in awarding and decreeing to libelant any sum whatever as and for such depreciation in market price.

X.

The said court erred in entering judgment herein in favor of said libelant in any amount whatsoever.

XI.

The said court erred in refusing to enter judgment herein in favor of claimant, and dismissing said libel, with costs to appellant.

ARGUMENT.

The Vessel Was Seaworthy.

Before discussing the law or the evidence bearing on the question of seaworthiness, we wish to call attention to certain allegations of negligence or fault made by appellee in its libels, which it did not offer any evidence to sustain, and abandoned in the court below. The elimination of these allegations will simplify the consideration of the questions involved; and we believe that the unfounded assertion of alleged acts of fault or negligence is proper to be considered in passing upon the question of liability for the claim asserted.

In the original libel (R. p. 7) it is alleged that "a large part of said merchandise, to-wit, 4,000 cases, was improperly stowed in the lower hold of said ship, without being properly dunnaged to protect the same from injury by displacement, and by contact with bilge water and damage by water leaking through the interior skin of the ship." The same allegation is found in both amended libels, except that no number of such cases is given. (R. pp. 20, 65.)

No claim of fault or negligence in these particulars was made in the court below; and there is

not a particle of evidence in the record to sustain such allegations. On the other hand, witness Max Gunther, second mate of the "Jeanie" on the voyage in question, who had charge of the stowage of this cargo, testified how the cargo was stowed, and that it was properly stowed. (R. pp. 345-346.) This was not contradicted, and it appears from this evidence to be true in fact. Captain Karbbe, master of the "Jeanie," also testified that the cargo was properly dunnaged. (R. pp. 272, 275.) This evidence is not disputed, and there is no evidence or claim that any damage was done to the cargo by improper or insufficient dunnage or improper stowage or handling by the ship.

It is also alleged in all three libels "That by reason of the misconduct and negligence of the master and crew of said ship, the pumps were not operated sufficiently to keep the vessel free from an accumulation of water in her hold," and that "by the negligence, carelessness, improper conduct and want of attention of the master, his mariners and servants * * * in failing to maintain adequate pumps on said vessel and to operate the same," water was allowed to collect and remain in the hold of the vessel and damage the cargo. (R. pp. 7, 9, 21, 23, 65, 68.)

There is not a particle of evidence in the case that the vessel did not have proper and sufficient pumps to handle all the water taken in by the ship, even during the extreme weather encountered; while the evidence of the master, second officer and even Pilot Thomas Cochrane, whose deposition libelant took, is that the pumps were sufficient, and were properly operated to handle all of this water, so far as was possible to handle it when the vessel was pitching and rolling in the terriffic seas encountered. (R. pp. 415, 416.) But, of course, even if these allegations were true, the ship would not be liable for the failure to operate the pumps, which would be part of the management of the vessel, within the third section of the Harter Act.

Negligence and fault on the part of the master, officers and crew, is also alleged "in failing and neglecting to keep the decks of said vessel properly caulked, the hatches properly battened down during said voyage, and in failing to keep the same covered with safe, adequate tarpaulin." (R. pp. 9, 23, 68.)

This also, if true, would come within the third section of the Harter Act, and the ship would not be liable therefor; but the undisputed evidence shows that these allegations are not true.

The testimony of Captain Karbbe (R. pp. 244, 268) is that the decks were caulked in August or September prior to the voyage in question, and claimant's original Exhibit "4," returned to this court, is a receipted bill for doing this work. Mr. Dawson testified to the same effect. (R. p. 310.)

Mate Gunther testified how he covered and secured the hatches, all in the usual and proper manner. (R. pp. 351-352.) There was nothing to dispute this testimony, and no claim is made of any defect in the covering of the hatches, other than the claim that proper tarpaulins were not used, which we will consider later.

The vessel was surveyed the last of June, 1912, by competent surveyors, who found her seaworthy and in fit condition to continue on her run from Seattle to Alaska ports (Claimant's Exhibit "7"), and she was placed in dry dock the last of July, 1912, again surveyed by these surveyors, recommendations made, repairs according to these recommendations made, and the vessel then found to be seaworthy and fit to continue upon said run. (Claimant's Exhibit "6.")

Prior to running into the extreme weather encountered on this voyage, the ship took no more water than is usual with wooden vessels, and even

the severe weather encountered did not cause her to take an excessive amount of water, no more than the pumps could safely handle. These facts are established, not only by the testimony of Captain Karbbe and Mate Gunther, but also by libelant's own witness, Pilot Cochrane (R. p. 416), and were conceded by appellee in the court below.

There is no claim, nor even an allegation in either of the libels, that the vessel was not seaworthy, so far as being properly officered, manned, provisioned and otherwise equipped and supplied with everything necessary to safely make the voyage in question, except the implied, rather than the express, allegation of want of pumps, which was abandoned, and the claim of want of proper tarpaulins. In fact, it has not been claimed, and cannot and will not be, that the vessel lacked anything necessary to safely care for and carry this cargo on this voyage through any weather which might be expected, other than the claim of improper tarpaulins.

This feature of the case is, therefore, narrowed to the charges of unseaworthiness from alleged want of proper cleaning after discharge of the coal, and from alleged want of proper tarpaulins and insufficient caulking of the deck seams.

To be seaworthy in these particulars it is not necessary that a vessel have the newest tarpaulins, nor any particular number for each hatch; nor that every crack or seam in deck and hull of this wooden vessel be so caulked that no weather or straining could possibly work the caulking loose or open a seam; nor so tight that no water could enter the ship under any possible conditions or in any weather; nor that she be so clean that not a particle of dust or dirt could fly in handling cargo, or in the working of the ship, and get upon cargo. Such conditions are absolutely impossible, and are not required by the law.

> "But the duty to supply a seaworthy ship is not equivalent to a duty to provide one that is *perfect,* and such as cannot break down except under extraordinary peril. What is meant is that she must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it."
>
> *Carver's Carriage by Sea* (4th Ed.), p. 21.

> "The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport."
>
> *Hutchinson on Carriers* (3rd Ed.), Sec. 366.

> "The seaworthiness of a vessel is to be determined with reference to the customs and usages of the port or country from which the

> vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. If, judged by this standard, the ship is found in all respects to have been reasonably fit for the contemplated voyage, the warranty of seaworthiness is complied with, and no negligence is really attributable to the ship or her owners."
>
> 36 *Cyc.,* p. 249.

In the case of *The Sandfield,* 92 Fed. 663, decided by the Circuit Court of Appeals of the Second Circuit, it was claimed a vessel was unseaworthy because a rivet in one of the steel plates below the water line became loosened on the voyage by the vibration of the vessel while straining and pounding, in weather of extraordinary severity. The court said that apparently the hole in the plate was not perfectly fair with the hole in the frame when the rivet was originally driven, and in consequence the rivet was not long enough when battered down to completely fill the countersink which broke off. The witnesses testified that on the voyage in question the weather was the worst ever encountered in their experience. The court used this language:

> "Undoubtedly the rivet was not as perfect as the workman might have made it, and was less capable of resisting the effects of strain and vibration than if it had been as absolutely strong and perfect as the best or average of the many thousand rivets in the vessel, but we

> agree with the district judge who decided the case in the court below that 'any such mere inequality in the strength of the rivets does not amount to unseaworthiness.' Whether the vessel was unseaworthy or not is to be determined by the test whether she was reasonably fit for the contemplated voyage. (Citing authorities.) If she was, it matters not that she was not impregnable to the assaults of the elements. If a vessel is reasonably sufficient for the voyage, and is lost by a peril of the sea, her owner is not responsible, as a carrier, for the cargo lost, upon proof that a stouter vessel would have outlived the storm."

After fully discussing the evidence in the case, the court concluded that the vessel was seaworthy "and that the rivet was fractured and loosened by the extraordinary strain inflicted upon it by stress of weather."

This case is particularly in point on the question of the leakage around the anchor locker, and through the seam near the forward hatch, which, as we will later point out, was caused by the straining of the vessel in the extraordinary seas encountered. This case is approved in a similar case decided by Judge Brown, in *The Ontario,* 106 Fed. 327, which was later affirmed on appeal.

Another case in point is *The Newport News,* 199 Fed. 968.

We also call the court's attention to the case

of *Cook vs. Southeastern Lime & Cement Co.,* 146 Fed. 101. This case is particularly in point, as it involved water damage to cargo carried on a wooden vessel, which leaked through the opening of some of its seams, caused by heavy seas encountered. The court discussed the evidence, which is very similar to the testimony of the navigating officers in this case, and used the following language:

> "The rolling of the ship, in what all the witnesses testify to have been uncommonly rough and heavy seas, with the attendant straining, furnishes a sufficient and reasonable explanation of the leaking. This rolling would prevent the pumps from exhausting all the water, and the damage from the blowing off the sea water from the hold, and from the taking in of water through the hatches, was a damage which could not have been avoided by the use of ordinary care. No human strength could resist, and no human foresight could prevent, the operation of these elements. Absolute impregnability to the assaults of the elements is not the test of seaworthiness. The test is whether she was reasonably fit for the contemplated voyage. Nor is there any rule which defines with unfailing accuracy the degree of violence of winds or waves which constitute a peril of the sea. Cross-seas of unusual violence are sometimes so held, and there is a case which holds that the blowing of the vessel is a peril of the sea."

Another case very much in point is the case of *The British King,* 89 Fed. 872, decided by Judge

Brown, of the Southern District of New York. The syllabus of the case, which indicates the holding of the court, is as follows:

> "Chemicals and rags being damaged by sea water from leaks in a steamer's ballast tank, which was found sprung and the rivets started and broken after heavy weather; *held,* upon evidence of first-class construction, careful inspection and good stowage, that the leak was sufficiently explained by the heavy weather that preceded it, and that the vessel was seaworthy; also *held* (2) that lack of proper attention to the pumps, which might have earlier disclosed the leak and prevented the damage, was negligence in the 'management of the ship,' for which the ship was not liable under the Harter Act; also *held* (3) upon proof that the sluice-valve in the bilges connecting compartments 4 and 5 was not watertight, that this fact did not constitute unseaworthiness, even if it existed at the commencement of the voyage, because not a failure in any necessary requirement, and because any leak therefrom would be sufficiently guarded against by proper attention to the pumps. The complaint was therefore dismissed."

This case is cited with approval in the latest decision in point on this question we have found, and to which we particularly call the court's attention. This is the case of *Griffin vs. Davison Lumber Co., Ltd.,* 224 Fed. 648, decided by Judge Morton, of the District of Massachusetts. The damage there was to a cargo of lumber, caused by water and by coal dust and dirt. The court held the ves-

sel liable for the coal dust damage, but not liable for the water damage. The court used the following language:

> "Whether she is also liable for the water damage depends upon whether she was tight and seaworthy when she put to sea. She was forty years old, but she had been thoroughly rebuilt less than a year before, and reclassified A 1½ for four years. Her master and steward testify that she was all right. The only evidence to the contrary is such as can be inferred from the fact that in a severe, although not extraordinary gale, during which she shipped a heavy sea which damaged her forward, she was so strained as to open her seams, and leaked so fast that the hand pumps were unable to keep the water down. The seas were unusually bad, and the vessel was forced to carry sail. The uncontradicted evidence is that under such conditions seaworthy wooden vessels are likely to leak. Some of the leakage may be attributable to the strain caused by the sea which came aboard. While the question is close, and the burden of proving compliance with the warranty is on the vessel (*The British King* (D. C.), 89 Fed. 872), it does not seem to me that the warranty that the vessel was tight and seaworthy at the beginning of the voyage was broken (*The British King, supra*). The injury to the cargo caused by the leakage of water alone is attributable to perils of the sea for which the vessel is not responsible."

The "Jeanie" was a wooden vessel; she had been in this same service about twelve or fourteen years, and had been in practically the same condition all the time. As we have already shown, she

was surveyed by competent surveyors in June preceding the voyage in question, and found seaworthy and in fit condition. Some repairs were made in July, and she was again surveyed by these same surveyors and found in good condition. Some caulking was done in September. There is no evidence that she leaked any more than all wooden vessels leak; nor that her hull, decks or hatches had leaked prior to this voyage. Her master considered her seaworthy and in good condition upon leaving Seattle for the voyage in question. (Testimony of Captain Karbbe, R. p. 244.) Mr. Swan, one of her charterers, testified that she was then "apparently in good condition." (R. p. 320.) Mr. Dawson, the other charterer, who had been in the shipping business some twenty-four years, testified that "she was in first-class condition" at that time. (R. p. 309.) Mr. Gunther, her second mate, testified "she was in a seaworthy condition, in my opinion." (R. p. 342.) And even libelant's own witness, Pilot Cochrane, in answer to both direct and cross-interrogatories, testified that she was "perfectly seaworthy." (Cochrane's deposition, R. pp. 413, 416.)

This testimony is undisputed, and certainly is conclusive, so far as the general condition of the vessel is concerned on leaving Seattle.

It may be claimed that the vessel strained and became unseaworthy because she stranded in Wrangell Narrows on her outward voyage. But the court certainly cannot assume this to be true, without a particle of evidence to that effect; while the undisputed evidence is that the vessel sank a little in soft mud between tides, and floated without aid. (Testimony of Captain Karbbe, R. pp. 245-247; testimony of Mate Gunther, R. p. 343.) No repairs were necessary because of this stranding. The United States Marine Inspector at Juneau considered that this stranding did not hurt her (R. pp. 247-248, 293), and she did not take any more water after than before. (R. p. 248.) Nothing happened to the ship at any time prior to loading this cargo, which it can be claimed rendered her unseaworthy in any particular, other than her state of cleanliness and her tarpaulins. Appellee contended and the court found that the vessel did not have proper tarpaulins for the hatches, and was therefore unseaworthy. The evidence offered by appellee to sustain this contention is as follows:

F. O. Burckhardt, Vice-President of appellee, testified that he "made an examination of the tarpaulins that had been on this forward hatch, and found that they were in bad condition, and a lot

of very fine pin-holes." (R. p. 85.) On cross-examination he admitted that he had only examined two tarpaulins (R. p. 98); but the evidence shows that there were three tarpaulins for each hatch. Mr. Roberts claimed the master had admitted to him that the tarpaulins were old and leaked (R. p. 113), but, on cross-examination, he stated that the master had said the hatches were properly battened, "but my tarpaulins were old" (R. p. 118), not that they leaked.

Mr. Charles A. Burckhardt, President of appellee, testified that he "examined the tarpaulins and they were absolutely rotten." (R. p. 154.) On cross-examination he said that he had previously heard these tarpaulins were rotten, and saw some tarpaulins on deck near the forward and after hatches, which he took hold of and tore, but he did not know that these were the tarpaulins used to cover the hatches. (R. pp. 167-168.) They may have been the ones used to protect the cargo in the hold from coal dust. (R. p. 346.)

On the other hand, Captain Karbbe testified that each of the four hatches had one tarpaulin cover that was "new that spring" and "in good condition" (R. pp. 259, 292, 297); that they had made only one trip with these new tarpaulins, and

that all the others "were fair tarpaulins." (R. p. 297.) Also West's testimony. (R. pp. 329-330.)

Mate Gunther testified that the hatches were secured by first covering them with 2 x 12 planks, wedged at the ends, the cracks were then caulked with oakum driven in, then each covered with *three* tarpaulins, and fastened with iron battens and wedged. (R. pp. 351-352.) He said that no water could get through the hatch so covered unless the oakum worked out (R. p. 352), and that none of it did work out, as the sailors had to take hooks to pull it out when uncovering the hatches at Seattle. (R. p. 352.)

The undisputed evidence is that only about 4,088 out of the entire 29,657 cases in this shipment were damaged by either water or coal dust, or both; and of this number not to exceed 3,000 were wet by water. Mr. West, who examined the cargo while on board the ship, found only about 600 cases wet under or near the forward hatch (R. p. 330), while about 800 cases forward and near a bulkhead were wet, and the cargo aft was reported in good condition. (R. p. 333.) We think the undisputed evidence shows that this cargo near the hatch was wet because of the opening of a seam or crack between the deck and hatch coaming, due to the

straining in the terrific weather encountered, and not to water going through the hatch covers or tarpaulins; while the balance of the water damage was from water entering other cracks also opened because of the straining. Certainly, in face of the undisputed evidence of the unusually severe weather the ship was in, and the small amount of water damage or water which entered the ship, and the evidence of the care taken in covering and protecting these hatches, the court cannot find that these tarpaulins were "rotten" and the ship was, therefore, unseaworthy. On the other hand, we believe the court will find that all of the water damage was from water entering through cracks in the deck or hull, which opened because of the great and continuous strain the ship was subjected to. This is proved by the testimony of Mate Gunther, who said it "came in through the deck right close to the hatch, near the hatch coaming" (R. p. 356), and through seams which were opened about the anchor locker by the working of the ship in the rough water (R. p. 357); also by the testimony of Mr. West that the forward bulkhead near the anchor chains was wet. (R. p. 331.)

Appellee will admit that the weather encountered by the vessel on this voyage was terrific and

continuous for days. It will claim, of course, that it was such weather as should have been anticipated in those waters at that time of the year. The only evidence as to the weather is the testimony of Captain Karbbe and Mate Gunther, witnesses for appellant, and Pilot Cochrane, whose deposition was taken in behalf of appellee. We would respectfully ask the court to read this testimony on the weather encountered, and then consider the small amount and character of water damage to the cargo, and the small amount of water which reached the ship's hold, and we believe the court will be satisfied that a vessel, which could stand that strain with so little damage to herself or cargo, was seaworthy so far as protecting the cargo from water is concerned; and that if a vessel is ever to be exempted from damage from perils of the sea, the "Jeanie" should be under the evidence in this case.

Captain Karbbe testified that after leaving Sitka for Sulzer, they encountered a "strong southwest swell," with a wind "about forty miles an hour;" that "the sea was enormous, these cross-seas, across from southeast, southwest and westerly swells, they just came up and they just—Oh, I never saw anything like it. I never saw any worse in all my work at sea. She took it (water) clean all

over." (R. pp. 251-252.) He said he left Sitka in the morning and returned about eleven o'clock that night, and tried to go out later but had to turn back again after three hours. (R. p. 252.) The vessel took no more water inside than the pumps were able to take care of. (R. pp. 254, 257.)

After leaving Ketchikan on the way to Seattle, after all the salmon was aboard, very bad weather was encountered. Captain Karbbe testified that they had "all bad weather—I never saw it before." That after they left Seymour Narrows they struck "a sixty-mile gale, with snow" and from 3:30 one afternoon until 11 o'clock the next day, they made only thirty miles, going full speed. (R. p. 256.) That it was "an awful sea, terrible sea; she was filling her decks all the time." (R. p. 256.) He also said this was not the weather he would expect to encounter at that time of the year, not so constant; that it was an unusually rough voyage. (R. p. 290.)

Mate Gunther testified that they "tried to go to Sulzer, but it was too rough to make it." (R. p. 347.) "It was so rough we had to turn back again;" that the vessel "took water over the forecastle head and over the decks;" that one night they could not steam against the sea nor turn back, "so

we hove her to." (R. p. 348.) He also testified that they "ran into a heavy gale in the Gulf of Georgia, some weather like I never seen in my life before;" that the heaviest of it lasted seven or eight hours. (R. p. 352.) "It was a gale I never experienced in the Gulf of Georgia, and as far as I know, nobody else aboard ship ever saw it blow as hard as it did that day. It was impossible to make any headway." .(R pp. 352-353.)

Appellee took the deposition of pilot Cochrane, of the "Jeanie," on this trip, and he also testified that these were "the hardest gales I have ever seen in Alaska waters." (R. p. 414.)

We submit that a vessel which could stand this weather with so little damage should not be held unseaworthy in this respect.

It may also be claimed that the vessel was unseaworthy because the bilge water forced a plank of the skin of the vessel loose, permitting a little water to come through. When the court considers the undisputed testimony of Mate Gunther, that this plank was sound and had been properly nailed, and, when renailed, held in place all right (R. p. 365), and considers how the vessel worked and rolled in the seas, causing the water always in the bilges of

every vessel to strike against this skin, we believe it will find that this fact did not render the vessel unseaworthy, under the same rule applied in the rivet case above cited.

But the loosening of this plank did very little damage. It happened after the Chilkoot salmon was aboard, but long before the other two shipments were received. The plank was promptly renailed and held in place. (R. p. 365.) This plank was forward near the Chilkoot salmon, which was also under the seams which opened about the hatch coaming and chain locker, and the court will see from Exhibit "1" that the proportion of damage to this salmon was only a little more than the damage to the other shipments. The loosening of the plank, of course, did not damage the two shipments received later, and could have caused very little of the water damage to the Chilkoot salmon, and is not worth considering.

The foregoing covers all the testimony relative to unseaworthiness, so far as water damage is concerned, and we believe fully sustains our contention that the vessel was, in fact, seaworthy in this respect. We therefore have only the question of cleanliness to consider.

This vessel carried north a cargo of bulk coal. A portion of this coal was discharged at Juneau, before any salmon was taken aboard. This coal was discharged from the forward lower hold. There had been no coal in the forward 'tween deck (testimony of Gunther, R. pp. 345, 361). After this coal was discharged, the hold was thoroughly cleaned. Mate Gunther testified as follows:

"Q. What steps, if any did you take to clean out the hold before putting the salmon in?

A. Well, first, we scraped it out—scraped it out with shovels, then we cleaned it out and scraped it out again, and then we cleaned it and swept it out again.

Q. What was the condition of the hold when you finished?

A. Well, it was as clean as we thought it was necessary to put in salmon; it was clean as it ever was.

Q. Could you get it any cleaner?

A. No; I could not get it any cleaner."
(R. p. 345.)

Afterwards the Chilkoot salmon, 10,748 cases (claimant's Exhibit "1") was taken aboard. This was stowed in the forward lower hold, where there had been some coal, and also the forward 'tween deck, where there had been no coal (R. p. 344); it was properly stowed and dunnaged (R. pp. 345-346), and precautions taken to prevent coal dust

getting on it. Mate Gunther testified as follows, which is not disputed:

"Q. Did you take any precautions to keep the coal dust from getting on that salmon?

A. Yes; we took tarpaulins and sails; we had an old mainsail there and an old foresail on the ship that we did not use, and an old jib; we had a new jib, and we covered the salmon all up, and we took the covers underneath them under the edges and nailed them and then took battens and nailed them fast on the side of the ship, so that there would be no possibility of dust getting in the salmon.

(R. p. 346.)

Q. How was this Chilkoot salmon protected from coal dust at the time you were putting it in the ship?

A. How was it protected from coal dust?

Q. Yes. There were no bulkheads between there and where the coal was?

A. We put covers over the salmon, old sails and a lot of covers; we nailed the pieces at the top against the beams and the sides were battened, so that there was no coal dust could get at the salmon.

Q. That was after the salmon was in, but while taking it in was there any protection against coal dust?

A. There was no dust blowing at the time; we did not touch the coal; the coal was away back from where we were stowing the salmon; it was not anywheres near the salmon.

Q. Was the ship lying still?

A. The ship was lying still alongside the dock; no dust floating at all."

(R. pp. 361-362.)

This protection was left up during the entire voyage. (R. p. 363.) Afterwards the balance of the coal was discharged at Ketchikan. The evidence does not show that any of this Chilkoot salmon was injured by coal dust, and we think the contrary appears. It will be seen from Claimant's Exhibit "1" that only 1,680 of the 10,748 cases were damaged at all. The three largest lots sustained only trifling damage of any kind, while one lot of 1,583 cases of unlabeled cans did not sustain any damage whatever. The smaller lots were all damaged. It will be remembered that this salmon was stowed forward where the water came through the anchor locker, and below where the water got through the loosened plank of the skin. This included the 800 cases which Mr. West found water damaged. Mate Gunther saw this damage before the ship reached Ketchikan to unload the coal. (R. p. 349.)

We therefore think it fairly appears that this lot of salmon sustained no coal dust damage at all. Its damage, being water damage, caused as shown above, resulted from a peril of the sea, for which

the ship was not liable. But even if it was damaged by coal dust, it was because, *after it was aboard,* the master and crew did not properly protest it from the dust of the coal afterwards discharged. This would not constitute unseaworthiness, but would be an error in management or navigation, within the protection of the third section of the Harter Act.

Corsar vs. J. D. Spreckels & Bro. Co., 141 Fed. 260.

After the balance of the coal was discharged at Ketchikan, the vessel was thoroughly cleaned as before (testimony of Captain Karbbe, R. pp. 254-255; deposition of Banbury, R. p. 433). Afterwards the Yes Bay (14,172 cases) and Cholmley (4,737 cases) salmon were taken aboard.

It would seem to us that this undisputed testimony proves conclusively that the vessel was seaworthy in this respect for carrying these shipments on this voyage. Certainly, all was done that a reasonably prudent man could do to make the vessel clean enough to carry cases of canned salmon. And even if a small amount of coal dust remained, after all the efforts to clean the vessel, it was not sufficient to render the ship unseaworthy, or liable for the large claim here asserted. This appears all the more clear when it is considered that, out of the

18,909 cases loaded at these last two canneries, only 2,408 sustained any damage *at all* (Claimant's Exhibit "1"); also that a large part of this damage was caused by water which entered the ship because of stress of weather. It will be remembered that much of this last mentioned salmon was in the forward hold and forward 'tween deck, where it was wet, as we have already shown. Certainly, the 600 cases under the forward hatch were from these shipments; and Mr. West estimated that not over 15% of the total damage was from the coal dust. (R. p. 336.) None of the other witnesses could give any estimate.

It would seem to us that the foregoing evidence shows conclusively that the vessel was seaworthy in fact in all particulars; in any event, that the owner, charterer and officers used all precautions and care required by the law to make her so. At least, we think that the evidence we have referred to shows that appellant overcame any presumption of unseaworthiness arising from the fact of damage to the cargo, and that appellee wholly failed to meet this evidence, and therefore is not entitled to recover anything in this suit.

Clark vs. Barnwell, 12 How. 272.

The Portuense, 35 Fed. 670.

Wolff vs. The Vaderland, 18 Fed. 733.
The Good Hope, 197 Fed. 149.
The Henry B. Hyde, 90 Fed. 114.
The Dolbardorn Castle, 212 Fed. 565.
The Folmina, 212 U. S. 354.
The Anna, 233 Fed. 558.

However, if the court should be of the opinion that the vessel is liable for either water damage or coal dust damage *alone,* the judgment would have to be limited to such part of the recoverable damage as resulted from such liability. The only evidence in the case as to the amount of damage from each cause is the estimate of Mr. West that about 15% was coal dust damage, and the award would have to be made on this basis.

Bills of Lading.

If the court finds that the vessel was seaworthy, or there is not sufficient evidence to hold her liable on the ground of unseaworthiness, that will end the case, and nothing further need be considered. But if the court finds the vessel unseaworthy in any particular, causing damage, we still contend that the ship is not liable under the terms of the bills of lading. These bills are attached as exhibits to the deposition of Purser Banbury. (R.

pp. 435-461.) He testified positively that the bills were signed and delivered to the respective representatives of appellee at each cannery, who delived the different shipments to the vessel, and at the time of such delivery. (R. pp. 431-435.)

Appellee did not offer the testimony of either of the persons actually in charge of the salmon at the canneries, who delivered the salmon to the ship, to disprove this testimony of the purser; nor was any reacon given why it did not do so, if the statement of the purser was untrue.

Appellee relied solely on the testimony of two of its officers, as follows: On his examination in chief as a witness for appellee, Mr. C. A. Burckhardt, President and Manager of appellee, was asked this question by its counsel, and answered as follows:

"Q. Have you in your possession or under your control any of the bills of lading or copies of them, that were issued for this shipment?

A. They were delivered to the warehouse people as soon as the goods arrived."

(R. p. 158.)

On cross-examination this witness was interrogated and answered as follows:

"Q. Your bills of lading were delivered to the warehouse man?

A. Yes, sir.

Q. And as far as you know, they are still in his possession?

A. Yes, sir." (R. p. 183.)

Later this witness was recalled by appellee, and he attempted to explain this positive statement by saying:

> "As far as this shipment is concerned, we have no records of any bills of lading having been delivered to us. I take it for granted that the bills of lading were delivered to the warehouse, not through any direct knowledge except their custom. I always understood they were delivered there or to Kelley-Clarke Company; and we received none at the office and there are none on file in our office now, nor has there ever been any."
>
> (R. p. 393.)

The witness also attempted to claim that the cannery watchman would not understand what a bill of lading was, and if he took one would keep it in the cannery file, but that the next spring the witness did not "observe or notice" any such bill of lading among these files, but did not say that he searched to find if they were there. (R. p. 394.) He also stated that about November 24, 1914, he had "occasion to make an examination of the papers on file and the records" of appellee at Portland, but did not "find among these papers or rec-

ords any bills of lading, or reference to bills of lading referring to these shipments." (R. p. 394.)

The witness did not even say he made any search for these bills, or even had them in mind when he examined the Portland office files. It certainly would not disprove the positive statement of Purser Banbury, to even show that copies of these bills of lading were not among the cannery files months after the shipments were made, nor among the Portland office files nearly *two years* afterwards, although this testimony does not even prove that much. If, as stated by the witness on his first examination, the bills of lading were delivered to the warehouse when the goods arrived, they would not be among the files at either place. No one connected with the warehouse was called to disprove this statement of the witness.

Witness F. O. Burckhardt, vice-president of appellee, was also recalled by appellee, and testified as follows:

"Q. What do you know about any bills of lading having been issued or delivered to anybody, for this shipment of goods?

A. I never saw any bill of lading that was delivered to myself or any of the employees of the company.

Q. Did you see any bill of lading in the hands of

the consignee or the wharf or the warehouse people, or Mr. Swan, or anybody else?

A. I do not remember as to whether Mr. Swan had a bill of lading or whether I saw one in his possession or not.

Q. Well, how about seeing it in anybody elses?

A. I do not remember seeing a bill of lading in anybody's possession.

Q. At the cannery, was there any bill of lading left or found there, to your knowledge?

A. No, sir.

Q. Did the watchman up there ever report to you anything about a bill of lading?

A. To my knowledge there was never, at any time, any shipment of salmon was there a bill of lading delivered to my watchman at Chilkoot.

Q. That is the cannery you had charge of?

A. Yes, sir.

Q. Do you know, Mr. Banbury, the purser of the Jeanie, on that trip?

A. Yes, sir.

Q. Have you had any conversation with him about bills of lading for this shipment?

A. I had a conversation with Banbury in Juneau.

Q. Fix the time, as near as you can.

A. Sometime during the month of November, 1914.

Q. Now, in that conversation, did Mr. Banbury tell you positively that he did not deliver any bill of lading to the watchman at the cannery?

A. He told me he was not sure as to whether or not bills of lading had been delivered to the

watchman at Yes Bay or Chumley, but his impression was that they had not been so delivered; that as far as Chilkoot was concerned he was absolutely positive that no bill of lading had been delivered to the watchman, for the reason that he was under the impression that my watchman could neither read nor write —that is, at Chilkoot. And, he stated, furthermore, in that conversation, that his impression, his recollection was, that the bills of lading had all been delivered to Mr. Swan for delivery to us after arrival of the Jeanie at Seattle."

(R. pp. 374-376.)

Mr. Banbury, in his deposition, denied having made any such statement to Mr. Burckhardt (R. p. 434; and we think the cross-examination of the witness (R. p. 387, etc.) shows that he at least misunderstood Mr. Banbury.

At any rate, the court knows that it is usual for every carrier to issue a bill of lading for goods received, and usual for shippers to require some evidence of the delivery of the goods to the vessel and of the agreement to carry them. The testimony of both officers of appellee shows this was usual with their shipments, and we certainly think the court will believe the positive statements of the purser, that he issued and delivered these bills, as he testified.

The trial court did not find that the bills were

not so delivered, but found "that these bills of lading were not delivered to any of the officers of the libelant company. If they were issued, they were delivered to the watchmen at libelant's canneries" (R. p. 482); and the decision of the lower court on this question was based on the ground that these watchmen "were not connected with the libelant company in any official relation, and who were not in a capacity to negotiate with relation to the transportation." (R. p. 482.) The court also found:

> "The record shows that there was an oral understanding between the parties with relation to the shipment of this cargo, and while no terms appear to have been detailed or specifically understood, liability could not be limited except by mutual consent, and if the bills of lading were not issued to any authoritative persons and there was no understanding with relation to them, then the libelant could not be bound by their stipulations."

We think the trial court was in error in finding that there was any such oral understanding. No officer or person representing appellee testified to any such understanding. The only evidence on this question is the following, given by Mr. Swan, one of the charterers of the vessel:

"Q. Did you send the order to Captain Corby that was received at Chilkoot and Yes Bay and Cholmley, to bring down that salmon?

A. I think I did; yes.

Q. That was on the request of Burckhardt or some one representing the Alaska Pacific Fisheries, was it?

A. Yes, sir.

Q. To bring out their goods?

A. Yes, sir."

(R. pp. 323-324.)

The request "to bring out their goods" did not constitute an "oral understanding" amounting to an agreement imposing the common law obligation of a carrier upon the vessel afterwards receiving the goods and issuing a bill of lading therefor, which was received by the person in charge of the goods, and authorized to deliver them to the ship. We think that it amounted, both in law and in fact, to a request to "bring out" these goods according to the terms of the usual bill of lading issued by such carriers therefor; and that both parties contemplated the issuance of such a bill of lading, and appellee is bound by the terms of the bills issued in this case.

These bills contain the following provisions:

> "The carrier shall not be liable for loss or damage occasioned by causes beyond his control, by perils of the sea, or other waters * * * by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull,

machinery or appurtenances, by collisions, stranding, or other accidents of navigation of whatever kind, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the ship owner, not resulting, however, in any case from want of due diligence by the owners of the ship or any of them.

The carrier shall not be responsible * * * for breakage of any property packed in boxes, barrels, crates or bales when such packages do not present evidence of rough handling or improper stowage * * * or for loss or damage resulting from providential causes. * * *

It is understood that the carrier's vessels are warranted seaworthy only so far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers and crew can secure it; and the carrier shall not be liable for loss, detention or damage arising directly or indirectly from latent defects in boilers, machinery, or any part of the vessel, provided reasonable measures have been taken to secure efficiency."

Section 2 of the Harter Act provides:

"That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligation of the owner or owners of said vessel to exercise due diligence (to) properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and

stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided."

While this section does not relieve the carrier from the duty to use "due diligence" to make his vessel seaworthy, yet, having done so, he is permitted to contract against the obligations of seaworthiness.

Hutchinson on Carriers (3rd Ed.), Sec. 363.
The Carib Prince, 170 U. S. 655.

These provisions of the bills of lading certainly exempt the ship in this case from liability, due to the entry of water through seams opening because of the terrible weather encountered, or the small amount of coal dust which it was impossible to get out of the ship.

The owners and charterers, having furnished a vessel in every way seaworthy and able to stand such unusual and unexpected weather, and having proper officers and crew, who used every reasonable precaution to clean the vessel for this cargo, and having properly stowed and handled it, ought not to be held negligent and liable on account of the small amount of damage which resulted from coal dust getting into these cases. To hold otherwise, would make the carrier an absolute insurer against damage, which is not the rule in water

shipments, and against which it protected itself by contract in this case.

> "Libelants, next observing that *The Newport News* herself suffered no serious injury, and that no other underdeck cargo received hurt, declare that no peril of the sea within the legal meaning of that phrase has been shown. But it is to be remembered that, in order to find peril of the sea, the losses sustained need not be extraordinary, in the sense of necessarily arising from uncommon causes. Rough seas are common incidents of a voyage, yet they are certainly sea perils, and damages arising from them are within the exception if there has been no want of reasonable care and skill in fitting out the ship and in managing her. *Carver* (4th Ed.), § 87. The violence of the sea here shown, acting upon a well stowed deck cargo, is, if sufficient to proximately account for all that happened, a peril of the sea, within the opinion in *The Frey,* 106 Fed. 319, 45 C. C. A. 309."
>
> *The Newport News,* 199 Fed. 968, 971.

The bills of lading also contain the following provision:

> "All claims for damage to or loss of any property to be presented to the carrier, or the nearest agent thereof within ten days from date of notice thereof—the arrival of vessel at port or place of discharge, or knowledge of the straining or loss of vessel to be deemed notice—and that after sixty days from such date, no action, suit or proceeding in any court of justice shall be brought for any damage to or loss of said property, and a failure to present such claim within said ten days, or to bring suit

> within said sixty days, shall be deemed a conclusive bar and release of all right to recover against the vessel or its master, said carrier or any of the stockholders thereof, for any damage or loss. The claim for loss or damage to any of the said property shall be restricted to the cash value of same at the port of shipment at the date of shipment."
>
> (R. p. 458.)

It is well settled that such a provision in a bill of lading is valid and binding, where the bill of lading is issued and accepted. It is also well settled that the purpose of such provisions, as to notice, is to give a carrier an opportunity to investigate claims made against it, before the evidence is lost or destroyed, so as to protect itself against improper claims, or settle proper ones.

In this case there is no evidence that any claim was ever presented to anyone, except possibly to Mr. West or Mr. Forman, who represented underwriters on the ship. It is true that both the underwriters' representatives and the charterers knew, upon arrival of the vessel, that the cargo had sustained some damage. While the vessel was being unloaded, about 2,000 cases which appeared to be damaged were set aside on the dock, while the balance was supposed to be undamaged and was sent to the warehouse. (R. p. 216.)

Mr. Horner was then instructed by some one to recondition some salmon. There is a dispute in the evidence as to what Mr. Horner was to do. He and Mr. Burckhardt testified that they understood he was to go over and recondition the entire cargo. But Mr. West (R. p. 327), and Mr. Dawson, representing the charterers (R. p. 314), understood that Horner was only to recondition what had been set aside as damaged. In fact, there was then no occasion to talk about the balance of the cargo, as it was supposed to be undamaged. If this knowledge of damage to these 2,000 cases is sufficient notice of claim for damage to them, it certainly was not notice of any claim for damage to the balance of the cargo.

Mr. Horner actually went over the entire cargo, but no notice was given anyone connected with the charterers or owners of the ship, or even the underwriters, that this additional work was being done, and no claim was ever made or presented for this work on the cargo which was supposed to be undamaged, and in fact was practically all undamaged, until after the work had been completed nearly three weeks, when Horner's bill was presented. At that time all evidence of damage, if any, had been removed, and no one interested in the ship, who

might then have heard for the first time of the claim for such large coal dust damage, and damage to the supposedly undamaged cargo, could secure any evidence about the matter.

This salmon had been stored for many months in warehouses in Alaska; but as neither charterers, owners nor underwriters on the ship had any notice that it was claimed that any of the cargo, except the 2,000 cases on the dock, was damaged, they had no opportunity to investigate and see whether this additional damage was coal dust damage or water damage, or damage from being held in the Alaska warehouse or from any other cause, or existed at all. The importance, to appellant, of being able to make such an investigation appears the clearer, in view of the fact, shown from Exhibit 1, that all the damage covered by Horner's bill was not caused by the ship. We will point this out in detail later. Nor was any claim made for loss of market price at any time, until March, 1914, a year later, when the first amended libel was filed.

We submit that the provision of the bills of lading issued, requiring notice of claim to be given, was a valid part of the contract of carriage of this salmon, and that this provision, not having been

complied with, in letter nor even in spirit, the claim was waived.

We also contend that this suit will not lie, for failure to bring the same within the time limited in the bills of lading. The suit was not brought until *nine months* after the goods arrived. But appellee seeks to avoid the effect of this stipulation of the bills of lading, by the agreement dated April 7, 1913. (Exhibit "B.")

The original libel was verified September 16, 1913. In October an amended answer was filed, setting forth and relying upon the condition of the bills of lading relative to filing claims and bringing suit. In March, 1914, an amended libel was filed, but it contained no suggestion of any agreement waiving, or which appellee claimed waived, this condition of the bills of lading.

On February 15, 1915, after all of appellant's testimony in the case had been taken, and the day before appellee took its testimony in rebuttal, a second amended libel was verified, in which, for the first time, the agreement of April 7, 1913, was mentioned, notwithstanding the fact that this agreement was made nearly two years before, and long prior to the commencement of this suit. No ex-

planation is given for not mentioning this agreement before.

However, we do not think this agreement in any manner waives this condition of the bill of lading. No authorities are necessary to show that this provision of the bills of lading is valid. The cargo arrived January 8, 1913, no claim was presented for damage within ten days, nor at least, if at all, until about the time the Horner bill was paid, about April 8, 1913, three months after the arrival of the vessel, and even more than ten days after the work of reconditioning the cargo was completed.

This suit was not brought until September following, more than nine months after the arrival of the cargo. The agreement is dated April 7, 1913, which was 89 days after the arrival of the vessel. The intent of the agreement, as expressed in the last paragraph, is not to waive any defenses then existing, but "to place the party of the second part in the *same position* as though the Steamer 'Jeanie' had been libeled and suit begun upon the date of the signing of this agreement." The claim was then barred, the agreement did not remove this bar, and for this reason alone appellee cannot recover in this action.

Loss of Market Price.

If, after considering the question of liability in this case, the court should be of the opinion that the vessel is liable for any damage to this cargo, it remains to be determined what the measure of such damage is, under the evidence in the case and the law applicable thereto. In considering this question, we think the various claims of damage made by appellee in this case, even though abandoned in the lower court, will throw light on the merits of the claims which will be asserted here, and which were allowed by the trial court.

An original and two amended libels were filed in this suit. In each of these libels claim was made for the amount of Mr. Horner's bill for overhauling, etc., the entire cargo of salmon carried by the "Jeanie" on the voyage in question (R. pp. 8, 22, 66). The original libel was verified September 16, 1913, long after all damages which appellee sustained or has ever claimed it sustained had been or could have been ascertained. In paragraph X of this original libel it is alleged that the salmon in question "after being so overhauled and reconditioned was depreciated in value to the amount of twenty-five hundred dollars" (R. p. 8). In the first amended libel and second amended libel, this

claim was abandoned; and there was not the slightest excuse for ever making such claim, as the testimony of appellee's witnesses was that "Mr. Horner put it into first class condition; he put it in the same condition we claim it was in when it left the cannery" (Testimony of F. O. Burckhardt, R. p. 97; Testimony of R. E. Small, R. p. 134; Testimony of W. H. Horner, R. p. 229). C. A. Burckhardt expressly stated that appellee did not sustain this item of damage (R. p. 164).

In paragraph XI of the original libel it is alleged that because of the necessity of reconditioning this salmon, appellee was delayed in marketing the same, and thereby deprived of the income therefrom for a period of three months, to its damage in the sum of $1,000. This claim was retained in the first amended libel; but in the second amended libel, the time was changed to 70 days, and the amount was changed to $985.80; but the whole claim was abandoned in appellee's brief below. This, of course, was necessary in face of the testimony of appellee's witnesses, which we will particularly refer to later, from which it appears that a part of this very salmon was sold in January, 1913, after being overhauled and found or put in first-class condition, and that no part of the balance

could have been sold during the time it was being overhauled, even if it had not been damaged.

In paragraph XII of the original libel, it is alleged that 2,000 cases sustained "irremediable damage," being "in an unsalable condition," to appellee's further damage in the sum of $4,500. This claim was abandoned in the subsequent libels and, of course, was wholly untrue in face of the evidence already referred to, and the positive statement of Mr. C. A. Burckhardt, President and Manager of the Company, that appellee did not sustain this item of damage. (R. p. 164.)

The foregoing are all the items of damage claimed by appellee in its original libel; but in its first amended libel, which was served in March, 1914, other items of damage are claimed, to-wit, $7,935.40, "difference in the market value" of the salmon between the time the shipment arrived and the time it was fully overhauled and reconditioned; also $778.47 for storage of the salmon during this period, and $150.54 insurance for the same period. These items, with Mr. Horner's bill and $985.80 loss of "income" for 70 days, instead of three months, as originally alleged, were claimed in the second amended libel.

In the court below, appellee expressly abandoned all claim for any of these items of damage, except Mr. Horner's bill and the $7,935.00, difference in market value of the shipment, and these were the only items considered and allowed by the trial court.

The claims for depreciation in market price, loss of income, storage and insurance, all rest upon the same theory, i.e., that because of the damage to the cargo, and consequent loss of time in overhauling and reconditioning it, appellee was required to hold, store and insure it during this period, losing sales meanwhile, thereby suffering damage to the extent of such cost of storage and insurance, and depreciation in market price, and loss of the use of the income therefrom. On the other hand, if this salmon could not have been sold during the period of this delay, then no loss on account of depreciation in price resulted from such delay; neither, in such case, was libelant deprived of any income therefrom during this time, and the storage and insurance would have been the same for this period whether the salmon was damaged and had to be reconditioned, or was undamaged but had to be stored and insured, awaiting sale. Inasmuch as no claim was made or allowed in the lower court

for these items, except the item of $7,935.00 for depreciation in market price between date of arrival of the shipment and the date it was all reconditioned, this is the only claim we need consider; although, as we have stated, the making of these other claims, and then abandoning them, and the making of this claim for the first time more than *a year* after the goods arrived, certainly should make the court scrutinize this claim with greater care, before compelling appellant to pay all or any part of it.

Appellant objects to the allowance of this item of damages, aside from the objections already made, for two reasons: First, because the undisputed evidence not only fails to show that appellee suffered any loss whatever on account of any depreciation in the market value of this salmon during the reconditioning period, but affirmatively shows that it did not suffer such loss; and, second, because there is no evidence in the case of market price upon which to base such an allowance.

We will first point out every particle of evidence in the case bearing on this question.

Mr. F. O. Burckhardt testified on his direct examination as a witness in behalf of appellee, that it disposed of its salmon through Kelley-Clarke

Company, as sales agent. (R. p. 86.) On redirect examination he stated that he could not tell the market value of this salmon at Seattle, in January, 1913, without refreshing his memory. (R. p. 100.) Later he said he did not know what the Company lost on this shipment (R. p. 392).

Mr. Heckman, appellee's next witness, said he did not know such value (R. p. 103).

Mr. Charles A. Burckhardt, testifying for appellee, was asked the following questions, and answered as follows:

"Q. If this salmon had arrived in an undamaged condition, what would have been the market value here in Seattle the date of arrival, or say January 8 or 10 or 11?

Mr. Bogle: I object unless the witness can show that they had a sale for it, otherwise the market price is not material, as there is no claim for the market price of the salmon, merely for damage to the salmon and cost of reconditioning and deterioration of the goods.

Mr. Hanford: I have to prove this in order to show we are damaged by delay.

Q. The gross amount?

Mr. Bogle: I object. The only allegation you make is damage by delay, is loss of interest during the period you were delayed in marketing the salmon.

Mr. Hanford: I want to show the computation of interest, show how much it amounts to.

A. $85,630.40.

Q. (Mr. Bogle.) What are you reading from?

A. A statement that I prepared.

Mr. Bogle: I object unless he can show he has some knowledge of the market value of these salmon and what he is basing it on.

Q. (Mr. Hanford.) Were you keeping track and observing the price of salmon during that time?

A. Yes, sir.

Q. Have you made a computation of the interest on that valuation up to the 20th of March?

A. $985.60.

Q. At what rate did you make that computation?

A. At six per cent.

Q. What, if any, change, any depreciation or market value occurred between the 8th of January and the 20th of March?

Mr. Bogle: I object as immaterial.

A. The market price of the salmon on March 20th was $77,695.00.

Q. (Mr. Bogle.) You are still reading from that statement?

A. Yes; a difference of $7,935.40.

Q. (Mr. Hanford.) State what you know about the condition of the market during January and February and March, as to it being active or dull or what it was?

A. We moved quite a good deal of salmon during January and February and March, but I

haven't any figures with me to say just exactly the amount that we did move.

Q. Do you recollect any particular sales that were made to Manila or elsewhere?

A. Yes, we made some shipments to Manila—some large shipments, but I do not recollect exactly the number of cases at this time.

Q. Well, during what periods or what months did that occur?

A. During January and February.

Q. That did not include any of these goods?

A. No, sir."

On cross-examination this witness testified that they were satisfied with the condition of the shipment after Mr. Horner had finished it (R. p. 163). He also testified that appellee did not sustain the loss of $4,500 alleged in the original libel (R. p. 164); nor the loss of $2,500 also there alleged on account of depreciation in the value of the salmon after it was overhauled (R. p. 164). He also testified that some of this salmon was sold by Kelley-Clarke on arrival, to the Pacific Commercial Company, at Manila, and he thought they filled this order out of other salmon on hand or that was later sent down from Alaska (R. p. 176). *The court will notice particularly the testimony we will later quote from Kelley-Clarke's representative that this particular order was in fact filled from the*

"Jeanie" salmon, and was obtained after this shipment arrived.

The witness further testified that he did not "pay much attention to that part of the details of the business. Kelley-Clarke are our sales agents. They looked after all these details for us" (R. p. 177).

Again, he said Kelley-Clarke would have the information about the sale of this salmon for Manila, and testified as follows:

"Q. Were you or were you not delayed in marketing this salmon by reason of it being overhauled?

A. Well, that is a very hard question for me to answer, Mr. Bogle.

Q. Just answer it if you can, yes or no.

A. I cannot answer yes, that would not be a proper answer, and no would not be proper. I will say that I could not answer that question, for the reason that Kelley-Clarke are in a better position to give you that information than I am.

Q. Would Kelley-Clarke be in a position to give us the information as to the marketing of this entire pack?

A. Yes, sir.

Q. And the length of time that it was held here in the warehouse?

A. Yes, sir." (R. pp. 178-179.)

He also admitted that if they had no market for the salmon at that time, they would have had to carry it in a warehouse (R. p. 179).

Relative to his testimony about market price, he was questioned and answered as follows:

"Q. Now this statement which you were reading from as to the market prices of salmon, etc., when was that statement prepared?

A. I prepared it today.

Q. That coincides with the statement of Mr. Small, does it not?

A. Yes, sir.

Q. Is it or is it not a fact you prepared that from Mr. Small's book?

A. No, sir.

Q. How did you prepare it?

A. I prepared it from circular letters that we have on file from Kelley-Clarke.

Q. What do those circulars contain?

A. Stating the offerings of salmon at these dates and the prices.

Mr. Bogle: I move to strike Mr. Burckhardt's testimony as to the market value of this salmon on the ground that it appears that he had no personal knowledge, and he took it from records compiled by other parties.

Mr. Hanford: I think that is the only way figures can be obtained after the transactions.

A. I can testify as to prices of salmon. I can bring statements up here from Kelley-Clarke

showing the value of that salmon, what we were paid for it at these dates.

Q. What do you mean by that, what you were paid for this particular Jeanie shipment?

A. No, what we were receiving for salmon of these grades at that time.

Q. The actual sales?

A. Yes, sir.

Q. Made at that time?

A. Yes, sir.

Q. Would Kelley-Clarke also be able to give us that information?

A. Yes, sir." (R. pp. 180.)

On re-direct examination he testified as follows:

"Q. In your position as a business man engaged in the salmon packing business and marketing of salmon, keeping track as you have stated you did of the market price, you have an independent recollection of the market price in January, 1913?

A. Yes, sir.

Q. The memorandum prepared by you today from the Kelley-Clarke circular, did that memorandum or circular which you prepared from the original sources of information merely verify your recollection?

A. It simply verifies my recollection of the prices.

Q. Having reference to that and having in mind your own memory of the matter, you state these facts as testimony that you are willing to stand by?

A. Yes, sir.

Q. (Mr. Bogle). Mr. Burckhardt, from your independent recollection, what was the market value of these salmon in January, 1913?

A. Pinks 65 cents a dozen; Chums 62½; medium reds $1.15.

Q. What was the price in February, February 1st, 1913—that was the opening market price, was it?

A. Yes, sir. The market price of Chums during the month of February were selling from 57½ to 60 cents; Pinks 65 cents; Medium Reds somewhere around 95 cents and one dollar.

Q. That is merely your recollection from keeping in touch with the market, not from any actual sales made, that is the asking price?

A. That was the actual market price at that time which goods were selling for." (R. p. 186.)

He also testified that Kelley-Clarke would have all the information he would have relative to prices and sales (R. p. 188).

This witness was later recalled by appellee, and was asked on cross-examination if appellee had "suffered any damage whatever by reason of the delay or the time consumed in reconditioning this shipment; that you lost any market or that you lost any sale?" (R. p. 400). An objection being made that this was not proper cross-examination, appellant called Mr. Burckhardt as its own witness, and he testified as follows:

His attention was called particularly to paragraph X of the amended libel, where it was alleged appellee had sustained this loss of $7,935.00 by depreciation in market price, and asked if appellee had, in fact, sustained this loss or any part of it. (R. p. 401.) He dodged answering the question for sometime, but admitted that appellee was unable to dispose of this salmon during this reconditioning period; that it did not lose any sale of this salmon nor any opportunity to sell it during that time; that appellee would have had to hold the salmon, store and insure it during this period if it had not been damaged (R. pp. 401-403), and was finally asked this direct question: *"You did not actually suffer that loss, Mr. Burckhardt,"* and answered, *"As I stated before, I do not think we suffered any loss"* (R. p. 404). He testified that he did not think appellee had sold any of the "Jeanie" salmon during this period, but admitted that if Mr. Small had so testified, it was probably true, as he would know. (R. p. 405.) He also admitted that appellee had a large amount of the same brands of salmon in its warehouse at Seattle, unsold, and for which appellee had no sale, and he was asked this question:

"Q. We want to be perfectly fair here, Mr. Burck-

hardt. Is it not a fact that in making up this computation that you have just taken the amount of salmon, and you figured up the market value of it, the day it arrived and you then figured up the market value the date when the reconditioning was entirely completed, and that you put that sum in irrespective of any sale or prospective sale?

A. Well, I would say that we did.

Q. (Judge Hanford). Have you been advised by your counsel that that is the legal measure of the damages, and that you were entitled to recover that under the law.

A. Yes, sir.

Q. (Mr. Bogle). So that the question of sale or possible sale or purchase of this salmon did not enter into it at all?

A. No, sir." (R. pp. 407-408.)

We think three things appear beyond controvery from the testimony above referred to, 1st, that none of these witnesses knew anything about the market value of the salmon, at the time in question; that Mr. Burckhardt's statement about the market value was purely hearsay, from what he found in Kelley-Clarke's letters and circulars, and the objection to his testimony on this question, and the motion to strike the same were well taken; 2nd, that there was no such demand for salmon during this period, as to constitute a market or market price for this large shipment under the

established rule which we will later refer to; and, 3rd, that appellee did not, in fact, lose one cent on account of any depreciation in the market price of this salmon during the reconditioning period, and therefore should not recover any damage on that account, unless damages are to be awarded where no loss has been sustained.

But all doubt on either of these questions is removed by the testimony of Mr. Small, manager of the salmon business of Kelley-Clarke, who was called as a witness for appellee (R. p. 131), and later recalled, as appears in the record, as a witness for appellant (R. p. 297), but in reality for further cross-examination as to matters he was unable to answer on his first cross-examination, and agreed to look up later. We respectfully ask the court to carefully read and consider the testimony of this witness, as he is the only witness who actually knew anything about markets for salmon, prices therefor and how they were fixed, and actual sales made of the salmon involved in this suit. This witness testified as follows:

He was asked by counsel for appellee if he was "personally acquainted with the market price of Alaska salmon in January, 1913," and said that he was. (R. p. 132.) The court will note that he

was not asked as to the market price of salmon at Seattle, nor as to the market price of the brands and grades of salmon involved in this suit, but merely the general question as to the market price. He was then asked as to the market price of Alaska Chums in January, 1913, *per case*, but this question did not refer to either the shipment in question or the price at Seattle (R. p. 132).

Objection was made to the question and the witness testified over the objection that the price was "62½ cents a dozen." "That would be $2.50 a case."

"Q. The quality of the salmon, generally; Pinks, what was the price of that?

A. 65 cents a dozen or $2.60 a case.

Q. And the price of Medium Reds?

A. $1.15 a dozen or $4.60 per case." (R. p. 132.)

He testified that Kelley-Clarke had the marketing of this salmon and that he knew the number of cases in the consignment, which was approximately 10,498 cases of Chums, gross value at $2.50 per case, $26,245.00; 14,373 cases of Pinks, total value $37,369.80; 4,786 cases of Medium Reds, valuation $22,015.60. (R. p. 133.) He was then asked, "Was there any fluctuation in the market price of these goods between the 10th of January and the

A. No sir, I have not.

Q. That circular is issued under your name, is it?

A. Yes, they are our prices.

Q. That is the prices that you endeavor to obtain for the pack of the season of 1912.

A. Yes, sir." (R. pp. 136-137.)

He further testified that this price is fixed "right after the packing season is over, or nearly completed, say the latter part of August," and that the busiest months for moving the pack were probably October, November and December; that after December it was more difficult to move the pack at the opening market price, January, February and March being the dull months for moving salmon. (R. p. 137.)

He then testified that owing to abnormal conditions in 1911, the price of the 1911 pack had gone very high, "and consequently there was a great revulsion of feeling in 1912 and *we had to make prices commensurate with the conditions as we found them; in other words, we had to put them on a basis that would popularize the article.*" (R. p. 138.)

The witness also testified that Kelley-Clarke handled from eight to nine hundred thousand cases of Alaska salmon for this year (R. p. 132), being

the salmon belonging to a large number of packers; that in making sales they endeavored to apportion the orders among their various clients, having regard, of course, to brands and grades ordered (R. p. 139).

He further testified that the opening market price set in August remained "fairly firm until after the first of the year, and then, after the first of the year, drifting right down through the spring, it had a lower tendency in some of the commodities" (R. p. 140); that they had sold "very little" of the grade known as Chums in January, 1913; "very few" of the grade known as Pinks or the grade known as Medium Reds; that "business was very light" in February, 1913; that there was very few consignments of any of these grades in February; that in March there was "a little more increase of business, *as the market went down and met the ideas of the jobbers,* as spring progressed, the business increased" (R. p. 141).

At that time he could not state how much, if any, of the appellee's salmon was sold in January, February or March, and was requested to secure the information, which he did, and subsequently testified to. *He testified, positively, that he had not sold any part of the "Jeanie" shipment prior to*

its arrival (R. p. 142). Later he was asked when the first decline in the price of Chums took place, and answered:

> "Well, the first evidence of it that I noticed in my records was in February, 57½, and then dropped to 55.

Q. About what time in February?

A. Oh, say the 10th or 15th." (R. p. 145.)

Asked if there was any market for this salmon at the time it arrived at the opening market price, he answered: "Very little business at that time."

"Q. Could you have disposed of this pack, consistently with the custom of your office, handling all of your customers at that time?

A. You mean this entire pack?

Q. Yes, sir.

A. No, sir, I could not." (R. p. 145.)

He also testified that the dull state of the market at this particular time was "more than the usual state of affairs" (R. p. 145).

When the witness was later called, he had secured the information which he was unable to give on his former examination, and testified as follows:

That they had sold 8,500 cases of Chum salmon belonging to appellee during the months of January, February and March, 1913; that these were

sold sometime during the month of January or February shipment, and that this lot consisted of 4,000 cases of Spear brand, 1,500 cases of Trolling brand, and 3,000 cases of Antler brand. He also testified that these 8,500 cases were sold to the Pacific Commercial Company at Manila, and were shipped on February 8th. (R. p. 298.) He testified that on January 25th, he shipped out a balance of 1,500 cases of Pinks, on a contract and that the total Pinks sold between January 8th and March 21st "amounted in small shipments up to 4,234."

"Q. That includes the 1,500?
A. That includes the 1,500." (R. p. 300.)

He also stated that during this period from January 8th to March 21st, they sold "708 cases of Reds—in comparatively small amounts" (R. p. 300). These were sold at various times in small amounts and that the total of sales for appellee during this entire period of all salmon was 13,708 cases. He then gave in detail the brands of the different grades of salmon sold (R. p. 300). He stated that they did not sell any salmon for appellee which they were unable to deliver during that period (R. p. 301).

He was then asked as to what amount of

salmon of various brands belonging to appellee was in the warehouse at Seattle, on January 8, 1913, his answer being, 1,269 cases of Reds, Sea Lion brand; 117 unlabeled cases, same brand; 2,384 cases King Talls, unlabeled, same grade; 1,206 cases of Talls, Empire brand, same grade; 1,539 cases of Halves, unlabeled, same brand; also a total of 10,152 cases of Pinks of various brands, and 17,767 cases of Chums of various brands, giving the number of each brand in detail. (R. pp. 302-303.)

He then testified, positively, that he did not receive any orders for salmon of the grades included in the "Jeanie" shipment between January 8th and March 21st, which they were unable to fill; that they had sufficient salmon of all grades on hand to fill all orders, and then said: *"Shipment of these orders that I have told you that we had, we filled out of the 'Jeanie' cargo,* because it happened to be convenient only."

"Q. Well, now, what do you mean by that?

A. Well, now, for instance, here we filled this Pacific Commercial Company *on Spear Chums and Trolling Chums,* we filled because we were in the process of overhauling at that time of the shipment, and we could use those instead of using stock that we already had in stock that we could have used. I used them, but I didn't have to use them."

"Q. You had plenty of other salmon of the same grade?

A. Yes.

Q. *Then, as a matter of fact, Mr. Small, did the Alaska Pacific Fisheries lose any market or lose any sale of salmon because of damage to the 'Jeanie' salmon?*

A. *I can't say that they did, no sir."* (R. pp. 304-305.)

He then stated that they used the "Jeanie" salmon instead of other salmon merely because it was convenient and had been freshly labeled and was in first class condition (R. p. 305), and that if they had *"used the other salmon they would have naturally inspected it to some extent before it went out"* (R. p. 305); that the expenses of such an inspection would be "Oh, trifling, three cents a case, maybe four cents a case. I have forgotten just what the price is" (R. p. 306).

He further testified that during this reconditioning period "we had a very ragged market and there were quite a good many goods."

"Q. That was because of the condition of the market?

A. Yes. The market conditions were very unhappy during the spring of 1913.

Q. That had nothing to do with the damage of the Jeanie—

A. (Interrupting) Not a particle; that had no bearing whatever.

Q. It had no bearing upon the sale of the pack of the Alaska Pacific Fisheries?

A. Not at all. The condition of the 'Jeanie' cargo, after it was properly overhauled, was in just as good condition as any salmon there was packed.

Q. I mean the fact that this salmon was damaged did not affect the sale of the pack by the Alaska Pacific Fisheries?

A. *No, sir; not at all.*

Q. *And the delay in reconditioning the salmon did not affect the returns which they got from it?*

A. *Not at all."* (R. pp. 307-308.)

It would seem to us that the mere reading of this testimony, without argument or citation of authority, would be sufficient to show any court that this item of $7,935.00 cannot be allowed. But, as the lower court allowed this large item of so-called damage, in face of this testimony, and as eminent counsel seem seriously to contend that such an allowance is justified, we will point out why we believe this is contrary both to law and justice.

From our earliest study of the law, we have understood that compensatory damages are never allowed unless a party proves that he has *actually suffered a loss,* and the burden of proof is on him. This is the first time we have known of a claim

being seriously made in a court for the recovery of thousands of dollars of damages, where the claimant expresssly admitted and proved by his witnesses that he had not lost, nor been actually damaged a cent of the amount claimed. No authority was cited by appellee below, nor can any be found, to sustain such a claim, where punitive damages are not allowed.

On the other hand, the authorities are uniform that no damages are recoverable, either in tort or for breach of contract, except such loss as the injured party is able to establish by evidence he has actually sustained, and such as is capable of being reasonably ascertained and computed. This rule is well stated in the following authorities:

> "Only actual damages, established by proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable."
>
> Moore, Carriers (2nd Ed.), p. 623.

> "Compensation for the actual loss sustained is the fundamental principle upon which our law bases the allowance of damages."
>
> Moore, Carriers (2nd Ed.), p. 624.

> "Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. Those that are spec-

ulative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages."

Central Coal & Coke Co. vs. Hartman, 111 Fed. 96, at 98.

"A mining company, wrongfully enjoined from operating a mine, is not entitled to recover on the injunction bond profits lost, where it appears that, on account of other mines, operations were not suspended by the injunction, and that the particular mine would have been worked to an uncertain extent."

U. S. Mining Co. vs. McCornick et al., 185 Fed. 748.

"The general rule is too well settled to require more than the merest reference to authority that only actual damages, established by the proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable."

Hollwig vs. Schaefer Brokerage Co., 197 Fed. 689, 701 (C. C. A. 6th Cir.).

"Where, in an action against a carrier for injuries to a steam shovel during transportation to the place where plaintiff intended to use the shovel in certain contract work, the only notice of special damages given to the carrier that would result from injury to the shovel beyond necessary repairs was from the delay which the carrier was notified would cause a loss of a contract penalty of $50 a day, plaintiff not having suffered such penalty and the contract having been terminated for other reasons and the injuries to the shovel having been fully repaired, plaintiff was only entitled to recover nominal damages."

Simons-Mayrant Co. vs. Atlantic Coast Line R. Co., 207 Fed. 387.

"The liability of a carrier to a shipper who has been charged and has paid the lawful published freight rates on interstate shipments, while lower rates resulting from rebates have been allowed other shippers over the same road, during the same period, and between the same termini, is not measured by the amount of the discrimination in the rates, but is limited to the pecuniary loss suffered and proved by the act of February 4, 1887, §8, which provides that a carrier doing any act prohibited by the statute shall be liable 'to the person * * * injured thereby for the full amount of damages sustained in consequence of such violation, * * * together with a reasonable * * * attorney's fee.' "

Penn. Ry. Co. vs. International Coal Mng. Co., 57 L. Ed. U. S. Sup. Ct., 1447.

The case of *Magdeburg Gen. Ins. Co. vs. Paulson,* 29 Fed. 530, is especially in point on this ques-

tion. There, a shipment of rice was damaged because of the unseaworthiness of the vessel. Libelant offered evidence to the effect that this damage was about 34% of the value of the rice. On the other hand, the ship showed that at very little expense the rice was reconditioned so that with the exception of a few bushels, it was in as good condition and sold for as much as though it had not been damaged. In that case, the Insurance Company had paid the owner the amount of his apparent loss and was subrogated to the rights of the owner, and sued for the amount it had paid, but the court refused to allow this claim, and allowed only the actual loss which resulted from the damage to the shipment.

> "*This universal and cardinal principle is, that the person injured shall receive a compensation commensurate with his loss or injury, and no more;* and it is a right of the person who is bound to pay this compensation, not to be compelled to pay more, except costs.
>
> This principle is paramount. By it all rules on the subject of compensatory damages are tested and corrected. They are but aids and means to carry out this principle; and when in any instance they do not contribute to this end, but operate to give less or more than just compensation for actual injury, they are either abandoned as inapplicable, or turned aside by an exception."
>
> *Sutherland on Damages,* Vol. 1, pp. 17-18.

"The elementary limitation of recovery to a just indemnity for actual injury, estimated upon the natural and proximate consequences of the injurious act, fixes a logical boundary of redress in the form of compensation, and furnishes a general test by which any particulars may be included or rejected. Recovery beyond nominal damages requires that actual injury be shown."

Sutherland on Damages, Vol. 1, p. 127.

In the case of *Gulf, etc., R. Co. vs. Godair*, 22 S. W. (Tex. App.) 777, suit was brought for damage to a shipment of cattle. The plaintiff kept the cattle until it was ascertained that the damage was less than appeared at first, but the court applied the rule of difference in value at time of arrival from their appearance then. The court said:

"That this is the general rule for measuring the damage in such cases is not questioned, but in this case there was evidence tending to show that the cattle, upon their arrival at Willow Springs, appeared to have sustained much greater injury than subsequently proved to have been the case; and, as appellee retained them until the real damage was ascertained, appellant contends that he should have been restricted to the actual loss he had sustained, and not allowed to recover the amount that erroneously appeared to have been received when the cattle first arrived, and we are of opinion that this is correct. We believe it has never been contended that a plaintiff can be restricted in the amount of his recovery to less than the real injury to his animal because the apparent in-

> jury did not seem to be so serious when first inflicted, nor can it be successfully maintained that a defendant should be required to pay more than the real damage because the injury to the animal appears to be more serious at first than it subsequently proves to be. This, of course, does not apply to stock intended for market, and sold by the owner before the actual loss is ascertained. In such case the owner only receives the value of his animal, while still in its damaged condition, and the difference between this and what it would have been worth is the actual loss to him, and represents the damage he has in fact sustained. Compensation for the actual loss is the great desideratum in applying the measure of damage in each case to the particular facts therein developed, and no hidebound or technical rules should be allowed to thwart or obscure this purpose, when it can be avoided."

Under these universal and fundamental rules, and the testimony in this case, how can the court allow any damage for loss of market never sustained? Unless it is to punish appellant, and place appellee in a better position than it would have been in, if the cargo had been delivered in perfect condition?

Admit, for the sake of argument only, that the cargo was damaged through fault of the vessel, and what more can appellee claim than to be put in as good position as though no damage had occurred? But what is that position? Suppose the cargo had

been delivered in perfect condition, appellee would not and could not have sold, prior to March 20, 1913, a can more than it in fact sold. This was because there were no buyers at prices appellee was willing to accept, not because the salmon was not in condition for sale. Why should appellant, because unfortunately a small amount of damage was done to this large shipment, be compelled to guarantee to appellee the price *asked* for such salmon on the day of arrival, when it could not then be sold for that price, or any price appellee was willing to accept? If that is the law, then a shipper of goods is fortunate indeed if a small part of his goods is damaged through fault of the carrier. He is guaranteed the market price on the day of arrival in any event, together with the cost of restoring the goods to their former condition. If the price meanwhile goes down, he gets the former price and his expense; if it goes up, he gets his expense and makes the profit, and the longer he can delay the reconditioning of the last piece of his goods, the better chance he has of making a profit on a raise in price, with no chance of loss if the price goes down. But more than that, he gets the price at which a few goods like his could be sold when his arrived, although he could not or would not have sold his goods at that price.

Is this putting an injured party in the *same position* he would have been in if his goods had not been damaged, to guarantee him a sale he could not have made if his goods were not damaged at all, and at a price he could not have obtained? If appellee lost nothing by the delay, as its President and witness Small frankly admit, when the question was put squarely to them, why should appellant be compelled to pay them this large amount, nearly *twice* what it cost to restore the goods, according to their own claim? Why make appellant pay more than appellee lost, if it is required to pay anything? If it pays the actual loss has it not done all that law and justice require?

But the allowance made by the court goes further than even that. Both the Burckhardts stated many times that Mr. Small knew exactly what sales were made of appellee's salmon, and the prices received, as well as the market prices.

The court will remember that Mr. Small testified that there was no change in the prices of pink salmon between January 8th and March 20th, 1913; that the only change was in the price of *Chums and Medium Reds.* He also testified that the first drop in the price of Chums was about February 10th or 15th (R. p. 145), when they dropped from the open-

ing price of 62½ cents per dozen in the fall, which prevailed until then, down to 57½ cents per dozen. That later they went to 55 cents per dozen, which was the price he fixed for March 20th, and on which he based his figures, which were adopted by the lower court. (R. pp. 134, 492.) But he further testified, from his records of the sales made by him of appellee's salmon, that *during January* he actually sold 8,500 cases of appellee's *Chum* salmon to the Pacific Commercial Co. at Manila; and shipped them on February 8th, before the drop in the price of this quality (R. p. 298); and he also stated, positively, that *4,000 cases so sold* were Spear brand and *1,500* were Trolling brand (R. p. 298). He further testified, positively, that these *5,500 cases were part of the "Jeanie's" cargo.* (R. p. 304.)

The court, in adopting Mr. Small's testimony on this question, and his gross figures were the same as Mr. Burckhardt's, allowed a difference of *30 cents* per case for the Chum grade. (R. pp. 132, 492.)

We therefore have this situation: *5,500 of these identical cases were actually sold* by appellee *in January,* within a few weeks of their arrival, and shipped 40 days before work on the last of the entire shipment was finished, without a cent of loss, except the cost of reconditioning; and appellee

claimed below and claims here, and the court below allowed a loss of 30 cents per case, or $1,650.00; on account of depreciation in market price of this particular lot, because weeks afterwards the price asked for this grade was 30 cents lower than when the shipment arrived and when this part was sold; and it allowed besides the cost of reconditioning this very lot.

These facts cannot be disputed. They are proven by this positive testimony of Mr. Small, from his actual records of the sale. While C. A. Burckhardt said he did not think any of the "Jeanie" salmon was sold during the reconditioning period, he admitted that if Mr. Small had so testified, it was true, as "Mr. Small would know." (R. p. 405.)

If this allowance is permitted to stand, appellee not only has *actually received the full price asked for this grade of salmon on January 8th,* but is also allowed the cost of reconditioning it, and $1,650.00 besides for depreciation in market price *long after its actual sale.* In other words, appellee would actually receive for these 5,500 cases $2.80 per case, besides the cost of reconditioning, although the highest price asked at any time was only $2.50 per case.

Again, the court will remember Mr. Small's testimony that there was no drop in the price of *pink* salmon prior to March 20, 1913 (R. p. 134), the only drop being for *Chums* and *Medium Reds;* also his testimony that 10,498 cases of this shipment were Chums, 14,373 Pinks, and 4,786 Medium Reds. By comparing Exhibit "1" with Mr. Small's testimony (R. pp. 133, 301-303), it will be seen that this lot of 4,786 was made up of the 1,298 cases and 1,717 cases of Empire brand in the Yes Bay salmon, 1,583 cases and 90 cases unlabeled and 98 cases Empire of the Chilkoot salmon. Of this lot only 498 cases suffered any damage whatever (Exhibit "1"). When the "Jeanie" salmon arrived, appellee already had on hand at Seattle, unsold, 1,269 cases of Medium Reds, Sea Lion brand, and 1,206 cases of Talls and 1,539 cases Halves, Empire brand (R. pp. 302-303), and between January 8th and March 20th, appellee was able to sell only *708 cases in all* of Medium Red salmon, and in small quantities only. (R. p. 300.)

In face of these facts, that only 708 cases could be sold at all, that appellee had on hand unsold, but ready to fill orders, 2,475 cases tall cans and 1,539 half cans of this grade, and received from the "Jeanie" 4,288 cases of the same brand wholly undamaged, the lower court accepted Mr. Small's fig-

ures and allowed as damage from depreciation in market price of Medium Red salmon in this shipment *one dollar per case on the entire shipment.* (R. pp. 132, 134.)

Turning again to the Chums, we find there were 10,498 cases of this grade in this shipment (R. p. 133), composed as follows: Of Yes Bay salmon, 469 Trolling, 1,052 Spear, of Chilkoot, 2,433 Trolling, 2,916 Spear, 609 Trolling, 619 Spear and 2,400 Spear. (Exhibit "1," R. p. 303). Of this lot only 1,610 cases were damaged at all. (Exhibit "1.")

As we have shown, 5,500 cases of these Chum salmon on the "Jeanie," or more than half of the lot, were actually sold in January at the price asked on January 8th. At the same time appellee had on hand at Seattle, unsold but awaiting sale, 17,767 cases of Chums, 5,298 being Trolling, 5,272 being Spear and 4,992 Antler. (R. p. 303.) But the only Chum salmon sold by appellee between January 8th and March 21st were the 5,500 cases of the "Jeanie" Trolling and Spear brands, and 3,000 of the Antler brand, which were on hand January 8th. (R. p. 298.)

In the face of this testimony, the trial court accepted Mr. Small's figures and allowed 30 cents depreciation in market price for every case of this

Chum salmon on the "Jeanie," a total of $3,149.00. The total allowance being the $4,786.00 for Reds, and $3,149.00 for Chums; total $7,935.

Further, this allowance was made in spite of the fact that of the 4,088 cases damaged out of the entire shipment, 1,980 cases were Pinks (4,088 less 2,108 Chums and Reds), which did not depreciate in market price at all (R. p. 134); *and the allowance was made for the time it took to recondition the Pinks as well as the other kinds.* We fail to see on what theory, in any event, appellant can be allowed for depreciation in market price of Chums and Reds, during the time the Pinks, which did not decline, were being reconditioned.

But why should any allowance be made for loss of market price? The only answer is that given by Mr. Burckhardt, that he was advised that was the legal measure of damage. (R. pp. 407-408.) Not that the damage was sustained; not that appellee lost any of this large amount because of any act or fault of the vessel or danger to the salmon, *or at all, for that matter;* but simply because that is the rule.

But we believe both counsel for appellee and the trial court are in error both as to the rule and its application. The rule contended for by appellee, and applied by the lower court, to-wit, the

difference in market price between the time when a shipment should arrive and when it actually arrives, has no application in a case like this; and no case was cited by appellee below where this rule was applied in such a case. No delay in arrival was claimed in this case.

The ordinary rule for measuring damages where goods arrived *damaged, not delayed,* is the difference between the sound market value and the damaged market value at the time and place of arrival.

Moore on Carriers (2nd Ed.).

Hutchinson on Carriers, (3rd Ed.).

The Berengere, 155 Fed. 439.

But in this case there is no evidence of any such difference between sound and damaged value, nor was the allowance claimed or made as such.

Neither does either rule of difference in price apply in such a case as this. The salmon in question was not shipped to Seattle to fill an order, nor for sale, except as demands for it might be made, but were not, in fact, made. It was shipped solely *to be stored until it could be sold.* It is only where goods are shipped for sale that this rule applies.

Hutchinson on Carriers (3rd Ed.), Secs. 1366, 1373.

Elliott on Railways, Sec. 1730.

The measure of damage applied where goods are not intended for sale, is the value of their use.

Moore on Carriers (2nd Ed.), Vol. 2, pp. 606, 608.

Hutchinson on Carriers (3rd Ed.), Sec. 1373.

But even this measure does not apply here, because appellee lost no use of this salmon. Therefore, the only rule to apply in this case is one fitted to the facts, to-wit: Put appellee in the same position it would have been in if no damage had been done, if appellant is liable for anything at all. This is justice, and is sound law. It is the fundamental rule, of which the others are merely particular applications, applicable to other conditions, but not here.

In this case, applying this sound, equitable and fundamental rule, what should be allowed, if anything, under this evidence? Certainly, nothing for any loss on account of failure of appellee to obtain the prices of January 8th, which could never have obtained more than it, in fact, obtained, and it did not sustain such a loss through any damage to the salmon, as it frankly admits. The amount which it necessarily paid to put the cargo in the condition it should have been in on arrival, if the vessel had not been at fault, if it was, answers this rule com-

pletely, and this was all appellee ever asked for before this suit was commenced.

Then, for the first time appellee made other claims of damage, which from time to time it changed and abandoned, admitting finally that all of these other claims except the large one under consideration, and Mr. Horner's bill, were wholly untrue or unfounded; and even admitting that it did not sustain a cent of loss on account of depreciation of market price. But it still clings to this claim, and every cent thereof, even in face of the undisputed fact that it actually received at least $1,650.00 of this amount, and never could have obtained more. Its excuse for this claim is that, by applying a rule of law to a state of facts to which it was never intended to be applied, and never has been applied before, it could get something for nothing. And to support its contention, authorities were cited below, where the rule has been applied in cases in which the proof showed the loss claimed was actually sustained, and this measure of damage was properly applied. Before discussing these authorities, we wish to discuss our second ground of objection to this item, *i. e.,* that the evidence fails to show any market or market price for this salmon, within the established rule.

> "In order to say of a thing that it has a market value, it is necessary that there shall be a market for such commodity; that is, a demand therefor, and an ability from such demand to sell the same when a sale thereof is desired. Where, therefore, there is no demand for a thing, and no ability to sell the same, then it cannot be said to have a market value."
>
> *8 Ruling Case Law,* 487-488.

The definition of the term "market value" is well stated as follows:

> "The 'market value' of a commodity, in its last analysis, means the price which it will bring in cash from a buyer who is willing to pay its value."
>
> *Parish & Co. vs. Yazoo R. Co.,* 60 So. 322.

It would not seem to be necessary to cite authority that there can be no market for an article of commerce, nor a "market value" therefor, unless there are persons willing to purchase the article at the price the owner is willing to sell for. A market cannot be made by either seller or purchaser alone, nor can the market price of an article be determined alone by what the owner is willing to take or a buyer is willing to give.

Again, the market price of a large shipment of goods is not to be determined by what a small portion of the goods could be sold for. If the rule is to apply at all, it must be the market price of the

entire shipment, not the market price of a few cans or cases out of the shipment.

In this case, the only evidence of market price of salmon in any way competent is the testimony of Mr. Small, who was asked the general question as to the market price of salmon of these brands at the time in question. The rule requires the market price to be shown at the place of destination of the goods; and there is no showing of that fact, unless the court takes the evidence of Mr. Small, that because of the implied, at least, combination between all the packers of salmon on this coast in fixing a price at which they would sell that year's salmon pack, this fixed the price at Seattle as well as everywhere else where this salmon was being held.

But aside from this question, Mr. Small testified in particular how the price of salmon was fixed. He stated that the Alaska Packers' Association of San Francisco, the largest packer of salmon on this coast, after considering the probable extent of the season's pack, and the demand therefor and general business conditions, sent out a circular fixing the price at which it would sell its salmon of various brands and grades, and that the little dealers, which included those represented by Kelley-Clarke, who handled all of appellee's pack, were forced to sell

their salmon at this price. Whether or not there was an express agreement between all of these dealers in fixing this price, at least there was such a common understanding among them as to amount to an agreement to arbitrarily fix the price at which they would sell the only available canned salmon in these markets. They maintained this price and compelled persons desiring to purchase salmon on this coast to pay the same or go without, until about the middle of February, 1913, when the owners of salmon, being unable to dispose of their pack at these prices, and in order to induce purchasers to take it off their hands before the next season's pack came in, commenced to reduce their price; but even then they were unable to dispose of the pack until they had put their price down to such a figure as purchasers were willing to pay.

At the time of the arrival of this salmon and during the entire period it was being reconditioned, there were no purchasers who were willing to pay the prices asked for these grades of salmon, except for small quantities thereof. It was absolutely impossible for appellee to have sold this entire cargo, or any considerable portion of it, at any of the prices named by Mr. Small, as the market price during the period of reconditioning. True, small

quantities of the salmon were disposed of during this period, but that does not fix a market price *for the cargo.*

Certainly, a carrier cannot be compelled to pay, as the market price of a large shipment of goods injured or lost, what a small portion of such articles could be retailed for; and when Mr. Small testified to the price per dozen or per case of these grades of salmon, and then an attempt is made to apply this price to this shipment of nearly 30,000 cases as the market value thereof, it is going far beyond any proper application of the rule.

On these questions, we wish to call the court's attention to the following authorities:

In the case of *Kountz vs. Kirkpatrick,* 72 Pa. St., 376, the court discussed the testimony as to the market value of oil. It appeared in that case that dealers in oil had bought up large stocks of available oil for the purpose of holding up the price, and fixed an arbitrary price at which they were willing to sell. The court quoted the following definition of "market price:"

> "To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices

upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that the value? Further, the holders of an article, flour, for instance, under a false rumor, which, if true, would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market, but according to what in their opinion will be its market price or value, provided the rumor shall prove to be true. In such a case, it is clear, that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as the rule of damages, is to make the defendant pay what in truth never was the value of the article, and to give to the plaintiff a profit by a breach of the contract, which he never would have made by its performance."

The court then discussed the evidence in that case of the fixing of the price at which holders of oil were willing to sell, and held that this evidence did not show a market price.

In the case of *Lovejoy vs. Michels,* 49 N. W. (Mich.) 901, recovery of the reasonable value of goods was sought; the evidence of value was the price fixed by a combination of dealers to fix prices of these goods. The court said:

"The trial judge heard and submitted the case upon the theory that a combination to fix prices was not unlawful if the purpose was to

fix reasonable prices, and when defendant sought to show that the prices fixed were not fair market prices, and were above the market value, the court refused to permit him, and restricted him to the market price, when, as a matter of fact, the association embraced all the manufacturers, and the only 'market price' was that fixed by the association. In *Richardson vs. Buhl,* 77 Mich. 632, 43 N. W. Rep. 1102, this court held that any combination to control prices was unlawful, as against public policy. In the present case, as in that, it was claimed that the combination had in fact reduced prices, and upon that point the court say: 'It is no answer to say that this monopoly has in fact reduced prices. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of the corporation at any time to raise the price to an ex*h*orbitant degree.' In the present case no price was agreed upon at the time the order was given, and there was no evidence tending to show that defendant had any knowledge of the price fixed by the association. An attempt is made to fasten a price fixed by a combination upon such a purchaser. It is sufficient to know that the price sought to be imposed is that fixed by the combination. If so, it was unlawfully fixed, and has no force as a market price, for that reason. It is the combination for the purpose of controlling prices that is unlawful, and the fact that they, the manufacturers, deemed the prices fixed to be reasonable, does not purge it of its unlawful character. Independently of the unlawful character of the combination fixing it, a price so fixed cannot be regarded as any better evidence of value than that fixed by any vendor upon his own wares. A price so fixed is not to

be entitled to rank as the market price. It is not a market price, within the contemplation of the law. The market price of an article manufactured by a number of different persons is a price fixed by buyer and seller in an open market, in the usual and ordinary course of lawful trade and competition. It cannot be divested of these incidents, and retain its character. Associations of this character give the buyer no voice, and close the market against competition."

In the case of *C. R. I. & P. R. Co. vs. Broe,* 86 Pac. (Okl.) 441, the court discussed the term "market value" as used in a statute fixing the measure of damages for delay in shipments of merchandise. The shipments under consideration there were large quantities of nails and wire, but the only evidence of market value was what the nails and wire would sell for per pound. The court said:

"The evidence on this point did not conform to the rule for determining such value. The market value, as applied to the case at bar, in contemplation of law, would have been what the different articles of merchandise would have sold for in bulk in the open market at Lawton on the different dates. The law does not contemplate that the carrier shall be liable for the value of merchandise if sold at retail. Such a rule would make the carrier liable, not for the market value of goods as sold in car load lots or in quantities as carried by it, but would also add to and include the profits of the sales at retail, without taking into consideration the costs incident to such sales. There was no evi-

dence before the jury by which it could determine the difference in the value of the articles in question when sold in bulk and when at retail. The case was tried upon the theory that the retail market should control. The court gave the jury no instructions as to this matter, and in the light of the entire record we must conclude that the jury understood that by 'market value' was meant the value which such articles sold for in the retail trade. The damages were estimated by an improper standard."

"No element of loss can be considered in the computation of damages, that is not clearly and unqualifiedly proved. * * * So, where there is no market price for an article, damages cannot be computed upon the belief of plaintiff, or other witnesses, more or less probable, that the commodity contracted for, and not delivered, could have been sold for a certain price."

Iron City Tool Works vs. Welisch, 128 Fed. 693 (C. C. A. 3rd).

"If the goods have no market value, the measure of damages (for injury to goods) is usually the cost of reproducing and replacing the articles, if this can be done;"

Elliott on Rys., Sec. 1734 (2nd Ed.).

In the case of *Western Union Tel. Co. vs. Hall,* 124 U. S. 444, damages were claimed on account of failure of the telegraph company to deliver a message authorizing the purchase of oil. Before delivery, the price went up. No order had been given to sell any oil, and the court held that as plaintiff

had suffered no actual loss, except the cost of the telegram, that cost was all he could recover.

The cases relied on by appellee in the court below, and which it will probably rely on here, are not in point, under the evidence in this case.

In the case of *Western Mfg. Co. vs. The Guiding Star,* 37 Fed. 641, the damaged butterine was actually sold in its damaged condition, the loss, of course, being the difference between the sound value and the damaged value.

In the case of *The Berengere,* 155 Fed. 439, Judge Wolverton expressly stated that difference in market value is the measure of damage only where there has been delay; but he said:

> "The rule, however, is otherwise where there has been no delay, and the cargo is damaged through fault of the carrier. In such case the measure of damages is the difference between the value of the goods in their damaged state and their value at the port of destination, had they been delivered in good order."

The case of *The Alexander Gibson vs. Portland Shipping Co.,* 56 Fed. 603, cited by Judge Wolverton and referred to in libelant's brief, was not decided on the point in question.

In the case of *United States S. S. Co. vs. Haskins,* 181 Fed. 962, the damaged coffee had a market

value and it was actually sold at a loss. The court held that the loss of market value was the correct measure of value.

In the case of *Page vs. Munro,* Fed. Cas. No. 665, the court held that there must be proof of damage from unreasonable delay, or none could be allowed. The court merely stated the general rule as to the measure of damages to be "that the carrier who unreasonably delays to deliver merchandise, such as is ordinarily bought and sold in the market, is responsible for the fall in price."

In *The Success,* Fed. Cas. No. 13,586, no exception was taken to the assessment of damages, the commissioner finding there had been a loss of market value.

In *The Golden Rule,* 9 Fed. 334, the court merely states the general rule, which had no application in that case, as there was no evidence of difference in value.

In *The Giulio,* 34 Fed. 909, the court held that the ship was liable for loss of market price during delay, if any should be proven.

In the case of *The Caledonia,* 43 Fed. 681, the decision was based on the fact that the shipper knew the cattle "were to be sold at the first possible mar-

ket day after arrival," citing *W. U. Tel. Co. vs. Hall,* 124 U. S. 444.

In the case of *The Caledonia,* 157 U. S. 124, the Supreme Court applied the rule of loss of market price because "it is found as a fact that these parties knew and contemplated that the cattle were not to be sold before arrival, but were to be sold at the first possible market day after arrival."

It would seem to us there can be no question that all of this allowance for so-called depreciation in market price must be disallowed.

Mr. Horner's Bill.

Even if the court should hold the ship liable for any damage to this cargo, we believe that it cannot allow the full amount of Mr. Horner's bill.

When the salmon was unloaded, all cases showing damage were set one side. These amounted to about 2,100 cases out of the total. Most of these cases came from the forward part of the ship. This was the portion that Vice-President Burckhardt saw wet on the ship (R. p. 92), although he also claimed to have stood on the deck and looking down into the after-hold saw some wet, dirty cases there. (R. p. 93.) He did not see any damaged salmon in any other part of the ship. (R. p. 94.) Mr. C. A.

Burckhardt did not see the cases in the forward part of the ship, but saw some dirty cases in the after-hatch, and some wet cases in this hatch near the skin of the ship. (R. p. 166.) Horner saw a few wet cases taken from the square of the main hatch. (R. p. 194.) Mr. West made a thorough investigation of the cargo in the forward part of the vessel, where all, or at least most, of the water damage was. (R. pp. 330, etc.) Mate Gunther also found the water damage to be in the forward and lower part of the ship. (R. p. 356.) After this cargo, which appeared to be damaged, was set aside, a meeting between representatives of appellee, the ship, its insurer and Mr. Horner was held and Mr. Horner was authorized to recondition this damaged salmon, but without admitting liability on the part of the ship. He says he understood he was to overhaul the entire cargo, but certainly there was no such understanding on the part of any one else, and no agreement to that effect was made by the owner or charterers of the ship, or their insurer. However, Horner claimed to have found other cargo which had been passed as undamaged, but which on further investigation showed damage, some from water, but mostly from coal dust. He, therefore, proceeded to overhaul the entire cargo, and recondition all that needed it, putting it in at least as

good, if not better, condition than it was in before. Horner's bill for work which he did on this cargo (Libelant's Exhibit "A") amounts to $4,283.06, and was paid by libelant. This bill includes a number of different items of charges, which we will consider separately, and in doing so will call particular attention to the discrepancies between this bill and Claimant's Exhibit "1." This exhibit is a statement made by Mr. Horner's foreman "of the condition of the number of cases and the brands purporting to be overhauled on that boat. Here is the brand. Here is what was done, on the work, showing how many cases cleaned and lacquered, cleaned, lacquered and relabeled." "Here is the record he kept of it. Here is a list he took off his book as he cleaned up each lot and I took a record of it. Q. That is correct, is it? A. Yes, sir. Q. How many cases does that show which sustained any damage whatever? A. There is about 4,088 cases." (Testimony of Horner, R. p. 221.)

Here, then, is a statement, made by the only person who knew how many cases were damaged and reconditioned, sworn to as being correct by appellee's witness, and not controverted. The bill, on the other hand, does not purport to be a statement made by any one, nor from any records, of the

damage or repairs to this particular cargo. Certainly, appellee is bound by this statement wherever it differs from the bill.

The first item of the bill is a charge for overhauling 29,657 cases. This was the entire shipment, but Exhibit "1" shows that the cargo was 13 cases short on delivery; therefore, this is admittedly an overcharge of 6 cents per case on 13 cases. Mr. Horner so stated. (R. p. 222.) Exhibit "1" also shows 58 cases of swells which had to be thrown out, not overhauled because of any damage on the ship. While these are small matters, they nevertheless cast suspicion upon the entire bill and claim.

Further, this charge of 6 cents per case, amounting to $1,779.42, was for opening up every case in the shipment, although only 4,088 cases in all were found damaged in any respect. (Exhibit "1," Tes. of Horner, R. p. 223.) Horner stated that they "would go along sometimes fifty or seventy-five or a hundred cases and not find any" damage (R. p. 223); also that after he had made the examination and reconditioned the cargo, he guaranteed the condition to be good, and would pay any claim for damaged goods. (R. p. 230.) He also testified that he made a business of overhauling and, where necessary, reconditioning salmon cargoes from Alaska.

This work, with Horner liable for any claim for damaged goods, was certainly of value to appellee; but it seeks in this case to make the ship pay for this work and guarantee, on over 25,500 cases which were not damaged at all, merely because a small part of the cargo was damaged, and there was a mere possibility that the balance might be, but was not.

Again, this bill contains a charge of $426.13 for lacquering and relabeling *3,964* of these same cases at 10¾ cents per case, and of $16.20 for lacquering *124* cases at 5 cents per case; also a charge of $1,022 for cleaning 4,088 of these cases, at 25 cents per case. These were all the same cases. (Tes. of Horner, R. p. 221.) Appellee, therefore, attempts to make appellant pay 6 cents per case for overhauling these 4,088 cases, 25 cents per case for cleaning them, 10¾ cents per case for lacquering and relabeling all but 124 of them, and 5 cents per case for lacquering the balance, or 41¾ cents per case on nearly all of the damaged salmon, besides all the other charges. We fail to see why the ship should be required to pay, in any event, an overhaul charge of 6 cents per case on cases which were damaged and had to be reconditioned; nor why it should have to pay this overhaul charge on the undamaged salmon, which gave

appellant the benefit of Horner's guaranty, and which, according to Mr. Small, would have had to be overhauled any how at an expense of 3 or 4 cents. (R. p. 306.)

The next two items of the bill are $426.13 for lacquering and relabeling 3,964 cases of this salmon at 10¾ cents per case, and $6.20 for merely lacquering 124 cases at 5 cents per case. But Exhibit "1" shows that *only 1,799 cases* out of this entire shipment were lacquered and relabeled, while *2,299 cases* were merely lacquered. Therefore, at most, the ship could not be held for more on these items than 10¾ cents per case on the 1,799 cases and 5 cents per case on the 2,289 cases, or a total of $308.84, instead of $432.33.

But if the court should find, as we have contended, that the ship was not in any event liable for damages to the Chilkoot salmon, a further reduction on all of these items would have to be made, for the 1,493 cases of this salmon cleaned, lacquered and relabeled and the 187 cases only cleaned and lacquered. This would also apply to all the other items of this bill. We would also again call attention to the fact that the larger part of the cans requiring relabeling were from the Chilkoot salmon, which sustained the greater water damage; the other

shipments required only cleaning and lacquering, without relabeling, showing the damage to them was mostly from coal dust which was dry and could be wiped off the labels without relabeling.

The bill also contains a charge of $291.50 for 2,650 new cases at 11 cents per case. This includes some new cases for broken ones (Tes. of C. A. Burckhardt, R. p. 155), for which no claim is made and for which the ship was not liable. But even if all of these new cases could be charged to the ship, there would be only the difference between 4,088 cases damaged and 2,650 new cases, or 1,438 cases partially damaged, so as to require one or more new parts. But the bill contains a charge of $178.50 for 5,950 new tops at 3 cents each, when only 1,438 could have been damaged by the ship, costing only $43.14, an overcharge of $135.36 as against appellant.

There is also a charge for 198,200 labels at 80 cents per thousand, but only 1,799 cases of 48 cans each of this cargo were relabeled, requiring only 86,352 labels, costing only $69.08, or an overcharge of $89.48, as against appellant.

It will thus be seen that under no possible theory of this case can appellee recover the full amount of this bill. If it paid a bill which was improper, that

fact does not bind the ship. However, we think it fairly appears, and the court will find from all the evidence in this case, that this bill, if it covers only work done and material furnished for this cargo, includes work and material done and furnished in putting this shipment in first-class condition by repairs made necessary, to a very large extent, by other causes than damage sustained on the ship. In any event, the burden was on the appellee to prove its actual damage. The bill does not prove this, and Exhibit "1" and Mr. Horner's testimony as a witness for appellee, being the only witness offered on this question, prove conclusively that all of the expense included in this bill was not made necessary by any damage to the cargo while on the vessel.

We contend, therefore, that even if the ship be held liable for the necessary expense of overhauling and reconditioning this cargo, on account of both water and coal dust damage, the amount of Mr. Horner's bill must be reduced by the following amounts, at least:

3 cents per case account overhaul charge	$ 889.71
Account overcharge for relabeling	123.49
Account overcharge for new tops	135.36
Account overcharge for labels	89.48
	$1,238.04

and that the most that can be allowed appellee in this case is $3,045.02.

The court allowed interest on the cost of reconditioning, amounting to $578.20. If the allowance of damages is reduced, this item of interest must be also reduced accordingly.

We confidently believe, however, that if the court will carefully consider the evidence as to what was done to make the "Jeanie" seaworthy, it will be satisfied that no liability whatever exists in this case, and the libel should be dismissed. If it nevertheless believes that liability exists for some of the damage to the cargo, it will limit the recovery to only the damage from coal dust, which, under the evidence, would be no more than 15% of the total recoverable damage. That in no possible event will it permit the recovery for loss of market price to any extent, much less for the $1,650.00 already received from the sale of the 5,500 cases of Chums in January. And that the allowance, if any, for reconditioning charges will be based upon the actual cost thereof, due to the damage caused by the ship, as appears from Mr. Horner's testimony, and not the bill which his evidence shows conclusively was not all necessary on account of this damage.

The case having been considered and decided upon the testimony taken out of court, this court is in as good position to decide the matters as was the lower court. This court, therefore, will not feel bound by any findings of the lower court, but will consider the whole case as a trial *de novo* upon the merits on the record.

Respectfully submitted,

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